TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 44

LINDSAY AND PHELPS COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN H. MULLEN AND THE STATE OF MINNESOTA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED FEBRUARY 7, 1898.

(16,791.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 239.

LINDSAY AND PHELPS COMPANY, PLAINTIFF IN ERROR,

vs

JOHN H. MULLEN AND THE STATE OF MINNESOTA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 In the Circuit Court of the United States for the District of Minnesota, First Division.

LINDSAY & PHELPS CO. (a Corporation), Plaintiff,
vs.
JOHN H. MULLEN, Defendant.

The complaint of the plaintiff shows to this court—

That the plaintiff is a corporation created, organized, and doing business under and by virtue of the laws of the State of Iowa, and is a citizen and resident of the State of Iowa.

That the defendant is a citizen and resident of the State of Minnesota and of said first division.

That said plaintiff is the owner and entitled to the immediate possession of that certain personal property which is described as follows—that is to say: Nine brails of pine logs lying and being in the Mississippi river at the town of Minneiska, county of Wabasha, State of Minnesota, more particularly described severally as—

One full brail of pine logs, numbered 2222, containing 1,064 logs, which scale 134,160 feet.

One full brail of pine logs, numbered 2228, containing 1,007 logs, which scale 132,120 feet.

One full brail of pine logs, numbered 2272, containing 1,071 logs, which scale 133,650 feet.

One narrow brail of pine logs, numbered 1030, containing 596 logs, which scale 70,650 feet.

One narrow brail of pine logs, numbered 1637, containing 658 logs, which scale 68,130 feet.

One full brail of pine logs, numbered 2304, containing 1,046 logs, which scale 138,230 feet.

One full brail of pine logs, numbered 2407, containing 1,004 logs, which scale 143,270 feet.

2–16 One full brail of pine logs, numbered 2387, containing 1,020 logs, which scale 141,380 feet.

One full brail of pine logs, numbered 2470, containing 990 logs, which scale 144,270 feet.

That the same all and singular and the possession thereof are wrongfully and unlawfully detained from said plaintiff by said defendant at the town of Minneiska, in the county of Wabasha, in the State of Minnesota; that said plaintiff has demanded and caused to be demanded of said defendant the delivery and possession thereof before the commencement of this action; but said defendant has refused and still refuses and neglects to deliver the same or any part of the same to the plaintiff, and that the same is worth and of the actual value of fifteen thousand ($15,000) dollars.

Wherefore said plaintiff demands judgment against said defendant for the immediate return and possession of the property above described, or the sum of fifteen thousand dollars ($15,000), the value thereof, in case a delivery thereof cannot be had, and two thousand

($2,000) dollars' damages for the detention thereof, besides the costs and disbursements of this action.

Dated August 7th, 1893.

THOMAS SIMPSON,
THOMAS WILSON,
Plaintiff's Attorneys.

OFFICE OF THOMAS SIMPSON, WINONA, MINNESOTA.

STATE OF MINNESOTA, } ss:
County of Winona, }

Fred S. Bell, having first been duly sworn, says that he is the agent of the plaintiff in this action, and that the foregoing complaint is true to deponent's knowledge except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

FRED J. BELL.

Subscribed and sworn to before me this 7th day of August, 1893.

THOMAS SIMPSON,
[NOTARIAL SEAL.] *Notary Public for Winona County, Minn.*

(Endorsed:) Complaint. Filed August 1, 1893. Oscar B. Hillis, clerk, by J. M. Sheardown, deputy.

* * * * * * *

17 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I hereby certify and return that under and by virtue of the annexed writ of replevin I did, on the 11th day of August, A. D. 1893, replevy all of the property described in the annexed writ of replevin, consisting of pine logs in brails lying and being in the Mississippi river in the town of Minneiska, in said district, and took said logs into my possession, and I did then and there serve a true and correct copy of the within writ of replevin on the party in charge of said logs, to wit, David Cratt, with my return attached to said writ, by handing to and leaving said copy of the writ of replevin with him at the town of Minneiska, in said district.

And I further certify and return that I did, on the said 11th day of August, A. D. 1893, personally serve the annexed writ of replevin, with a copy of my return thereon, on John H. Mullen, the within-named defendant, by handing to and leaving with him a true and correct copy of the within writ at the city of Wabasha, in said district.

Dated August 12th, A. D. 1893.

J. C. DONAHOWER,
United States Marshal,
By T. J. SHEEHAN, *Deputy.*

Service (2).....	$4.00	
Disbursements..	68.49	being for special deputies as guards and their board.
	$72.49	

18 (Original.)

United States Circuit Court, District of Minnesota, First Division.

LINDSAY & PHELPS CO. (a Corporation), Plaintiff, *against* JOHN H. MULLEN, Defendant. } Writ of Replevin.

UNITED STATES OF AMERICA, *District of Minnesota, Third Division,* } ss:

The President of the United States of America to the marshal of the district of Minnesota, Greeting:

Whereas, the plaintiff in the above-entitled action claim- the immediate delivery of the following-described property: Nine brails of pine logs lying and being in the Mississippi river at the town of Minneiska, county of Wabasha, State of Minnesota, more particularly described severally as one full brail of pine logs, numbered 2222, containing 1,064 logs, which scale 134,160 feet; one full brail of pine logs, numbered 2228, containing 1,007 logs, which scale 132,120 feet; one full brail of pine logs, numbered 2272, containing 1,071 logs, which scale 133,650 feet; one narrow brail of pine logs, numbered 1030, containing 596 logs, which scale 70,650 feet; one narrow brail of pine logs, numbered 1637, containing 658 logs, which scale 68,130 feet; one full brail of pine logs, numbered 2304, containing 1,046 logs, which scale 138,230 feet; one full brail of pine logs, numbered 2407, containing 1,004 logs, which scale 143,270 feet; one full brail of pine logs, numbered 2387, containing 1,020 logs, which scale 141,380 feet; one full brail of pine logs, numbered 2470, containing 990 logs, which scale 144,270 feet, and the affidavit of Fred S. Bell, agent of the above-named plaintiff, has been made, showing, among other things, that said plaintiff is lawfully entitled to the possession of said property; that the same is wrongfully detained by the defendant and is of the actual value of fifteen thousand ($15,000.00) dollars, and said plaintiff has, by an endorsement on said affidavit, required the issuance of a writ, as provided by law, and duly filed said affidavit so indorsed:

Therefore we command you that if a bond with sufficient sureties shall be executed to the defendant in due form of law you take the property herein described and the same safely keep until disposed of according to law, and that you proceed herein in the manner required of you by law.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, [SEAL OF COURT.] the 11th day of August, A. D. 1893. Issued at my office in the city of Winona, under the seal of said circuit court, the day and year last aforesaid.

OSCAR B. HILLIS, *Clerk*,
By J. M. SHEARDOWN, *Deputy*.

THOMAS SIMPSON,
THOMAS WILSON,
Plaintiff's Attorneys.

[Endorsed:] No. —. United States circuit court, district of Minnesota, third division. Lindsay & Phelps Co., plaintiff, *vs.* John H. Mullen, defendant. Writ of replevin. (Original.) Returned and filed Sept. 1st, A. D. 1893. Oscar B. Hillis, clerk, by J. M. Sheardown, deputy. Thomas Simpson, Thomas Wilson, attorneys for plaintiff.

19 In the United States Circuit Court, District of Minnesota, First Division.

LINDSAY & PHELPS COMPANY (a Corporation), Plaintiff,
against
JOHN H. MULLEN, Defendant.

And now comes the defendant and, answering the complaint of the plaintiff in the above-entitled action, denies each and every allegation, matter, and thing therein contained, whether as therein stated or otherwise, save as hereinafter expressly stated, admitted, or qualified.

Said defendant admits that said plaintiff is a corporation, as alleged in said complaint, and that said defendant is a citizen and resident of the State of Minnesota and of the first division thereof. Said defendant expressly denies that he has any knowledge or information thereof sufficient to form a belief as to whether said plaintiff is or ever was the owner of the personal property described in said complaint or any part thereof, and said defendant expressly denies that said plaintiff was at the time of the commencement of this action or at any time thereafter entitled to the possession of the same, whether as alleged in said complaint or otherwise, and said defendant expressly denied that he ever at any time wrongfully and unlawfully detained said property described in the complaint, or any part thereof, from said plaintiff, whether as alleged in said complaint or otherwise, and denies that he ever detained the same or the possession thereof, or any part thereof, from said plaintiff under any other or different circumstances than as hereinafter stated; and said defendant further admits that said plaintiff demanded the delivery and possession of the property in said complaint described prior to the commencement of this action, and that this defendant refused to deliver the same or any part thereof to said plaintiff; and said defendant further alleges that since the commencement of this action the United States marshal for the district of Minnesota, duly qualified and acting and under and by
20 virtue of a writ of replevin issued out of and under the seal of said court, has seized and taken possession of that portion of the property described in said complaint which said defendant then and there had in his possession, as hereinafter stated, and, as said defendant is informed and believes and so alleges the fact to be, the said marshal after seizing and taking possession of said property under said writ, as aforesaid, turned over and delivered the same to said plaintiff.

And said defendant, further answering, denies that the property

attempted to be described in said complaint, being the property taken and held by said plaintiff as hereinafter stated, was ever worth the sum of $15,000.00 or any other or greater sum than seventy-five hundred dollars, and said defendant expressly denied that said plaintiff has ever been damaged by reason of any detention of the property detained by said defendant, as hereinafter set forth, in any amount whatsoever, whether as alleged in said complaint or otherwise.

And said defendant, further answering, alleges that he is and ever since the 17th day of April, 1893, has been the surveyor general of logs and lumber for the fourth district of Minnesota, duly appointed, qualified, and acting; that the Minnesota Boom Company is and ever since the 16th day of April, 1889, has been a corporation duly organized, created, and existing and chartered under and by virtue of the laws of the State of Minnesota; that the general nature of the business of said Minnesota Boom Company is and was at all the times herein mentioned the construction, maintenance, and use of booms, dams, and other structures of any kind necessary or advantageous to the performance of the logging and lumbering business upon the Mississippi river or either branch thereof; also upon or on any side or bank of any slough, bayou, branch, or part of said Mississippi river; also covering the gathering, *the gathering*, driving, booming, storing, assorting, rafting, brailing, and otherwise handling logs, lumber, and timber of any kind for itself and for any and all persons having logs, lumber, or timber upon the waters of said river
21 between the mouth of the Chippewa river or a point opposite thereto and the point where the easterly boundary line of the city of Winona meets the Mississippi river or a point opposite thereto, and also at divers and sundry other places; that within the limits of the county of Wabasha, in the State of Minnesota, and within said first division of said State and within the said fourth district of said State of Minnesota, as said State is laid off for the purpose of the survey and measurement of logs, lumber, and timber within said State, as provided by law, and branching out from said Mississippi river, is a large slough, about three miles in length and of at least one-quarter of a mile in width on an average at ordinary stages of water, commonly called and known as the West Newton slough; that said Minnesota Boom Company, acting under and by virtue of its said charter, duly issued and granted to it by the said State of Minnesota, and under and by virtue of the laws of said State, built and constructed several years ago and ever since said time has maintained, continued, owned, and operated a large number of booms within the limits of said slough for the purpose of collecting, gathering, storing, assorting, brailing, rafting, and handling logs, timber, a-d lumber as they should come down the Mississippi river from points above in the ordinary course of business, being all the booms in said slough contained and being the boom hereinafter referred to; that a large quantity of logs annually pass down said Mississippi river and into and through said fourth district of the State of Minnesota, and that said logs always belong to a greater

number of different owners, whose ownership is marked and distinguished one from another solely by a large number of different marks and devices, which are cut upon said logs; that there are and for many months prior to the 17th day of April, 1893, have been and ever since that time have been on file and of record in the office of this defendant, as surveyor general as aforesaid, under and pursuant to the statutes of the State of Minnesota in such case made and provided, several hundred different marks, each of a peculiar and unique character, but distinguishable one from the other
22 and indicating said different ownerships, and that the business of logging and lumbering as now and for many years last past carried on within the limits of the State of Minnesota and other adjacent State*d* has been and is necessarily and will continue to be of a nature that the ownership of all logs must be and is necessarily indicated by the marks and devices cut upon said logs, as hereinbefore set forth, and such other marks and devices as may from time to time be created and devised; that marks and devices of the character hereinbefore referred to are and for many years last past have been and will continue to be commonly used by all persons, firms, and corporations engaged in the business of logging and lumbering for the purpose of indicating the ownership of each, and for the purpose, as far as possible, of separating the property of the one owner from that of another, each owner using in all instances marks and devices other and different from those used by any other owner, and that all the logs herein and in said complaint referred to were and are marked and identified by means of such characters and devices cut upon the same, as hereinbefore set forth; that in spite of all the contrivances that the ingenuity of man has been able to devise, and owing largely to the fact that the business of logging and lumbering has grown so great and covers so much territory and such quantities of timber and logs and is engaged in by so many different persons, firms, and corporations, it is and for many years last past has been and for many years yet to come will be impossible to keep the logs of any particular firm, person, or corporation separate and distinct from the logs of any other person, firm, or corporation when the same are floating upon the waters of the Mississippi river or of any of the streams tributary thereto; that in the practical operation of the business of logging and lumbering it has been found, as the fact is, that the logs of different owners become intermingled by reason of accident, storms, carelessness, and particularly the efforts of wrong-doers, who, for the purpose of depriving the true owners of their property and their rights in and to the
23 same, take advantage of the unique nature of the property and seek to and do intermingle the said logs belonging to any one person, firm, or corporation, whose property they seek to take or control, with the logs of others; that when logs become so intermingled, as aforesaid, whether by chance or otherwise, it becomes, is, and will continue to be necessary for the various owners thereof, in order to save their respective logs and properly enjoy the use and benefit thereof, to have the same picked out and separated

one from another so far as possible, and for that purpose, among others, there has been and is built, constructed, erected, and maintained by said Minnesota Boom Company, within the limits of said State of Minnesota, and particularly within the limits of said fourth district, and in said West Newton slough, a large boom for the assorting and handling of logs, and inasmuch as the said West Newton slough is particularly well situated for said purpose, it has been taken possession of, as aforesaid, by said Minnesota Boom Company and all of the logs which come down said Mississippi river and its tributaries into said fourth district of the State of Minnesota are floated into and through said West Newton slough and into and through said booms built, erected, constructed, operated, and maintained by said boom company, as aforesaid, for the purpose of assorting, gathering, collecting, storing, brailing, rafting, and handling the same; that after said logs are assorted, as aforesaid, and while they are in said boom they are put from time to time into brails and rafts in order that they may be conveniently handled and taken from place to place upon said river and for the general convenience of the owners thereof in handling, selling, and disposing of the same.

That during the season of 1893 and up to the present time there have been passed through said boom in said West Newton slough in such manner and not otherwise about 500,000,000 feet of logs, and that said logs were and are marked by a large number of different marks, as aforesaid, and, as defendant is informed and believes and so alleges the fact to be, were owned by a large
24 number of different persons, firms, and corporations, each owning different lots.

That said logs are passed through said slough and said boom at a very rapid rate and in very great and large numbers and quantities from day to day while the season lasts and while there is sufficient water in said Mississippi river to permit said logs to run freely; that the State of Minnesota, for the purpose of protecting the people thereof and their rights in and to their property in logs, and for the purpose of preventing fraud, conversion, and wrong-doing in respect to the selling, handling, booming, measuring, brailing, rafting, gathering, and storing of said logs and the ownership thereof, has passed wise and salutary laws for the inspection, scaling, and surveying of logs, and has provided for the keeping of proper public records in respect to the same and the ownership thereof, and the marking, scaling, surveying, and inspection thereof, and for the better accomplishment of said purposes and each of them has divided said State into several districts, and has provided for the appointment of surveyors general in each of said districts to take charge of, measure, and control such inspection, scaling, and surveying, and has made it the express duty of said surveyors general and each of them, including this defendant, to inspect, survey, and scale logs in the manner provided by law and for the purposes aforesaid, and has made it the express duty of this said defendant to inspect, survey, and scale all logs which might at any time come into the booms of the said Minnesota Boom Company in said West New-

ton slough, as hereinbefore set forth; that while said logs are passing through said boom in said slough they are gathered together into brails and rafts and thereafter towed and floated down the Mississippi river to be used for commercial purposes, and are oftentimes sold in bulk in the rafts, and in case of such sales the purchasers, as a general rule, are obliged to rely for the quantities in such brails and rafts contained upon the scaling, survey, and measurement made at said boom at the time said brails and rafts are made up; that when logs passing through said boom are scaled, surveyed, and measured
25 by parties interested therein it has been found, as the fact is, that many errors and mistakes creep in, and it oftentimes occurs that such mistakes are made purposely, so that rafts and brails when made up, as aforesaid, do not correctly and accurately show the quantities of logs actually therein, although they nominally purport so to do; that said boom company is and was at all the times herein mentioned owned and controlled by persons and individuals who are engaged in and pecuniarily interested in the business of logging and lumbering, and from time to time it becomes and is for pecuniary interest of said boom company and those interested therein that correct measurement, surveying, and scaling of logs passing through said boom should not be made, and in many instances said boom company and persons interested therein have prevented and endeavored to prevent true and correct measurements, surveying, and scaling from being made through the persons duly authorized by laws so to do, particularly including this defendant; that after said brails of logs are made into rafts at said booms they are oftentimes towed down said Mississippi river, and compensation is paid therefor to the steamers and towing companies for such towing, and said compensation is based upon the amount of timber in said rafts and each of them; that in a great many instances rafts of logs are made up in said boom to be taken down and the same are taken down said river to be sawed at mills owned or controlled by persons pecuniarily interested in or controlled by said boom company or owned by corporations, persons, or firms closely allied to said boom company and its owners and stockholders and whose pecuniary interests are substantially identical with those of the owner of said boom, and it frequently occurs that where said rafts are towed down said river from said booms to mills so owned, operated, and controlled, as aforesaid, that the logs in said rafts are scaled by or at the instance of persons, firms, or corporations interested in having them appear to contain as small a quantity as possible, with the effect that they do show, when so scaled, a less quantity of logs therein than actually exists, and in other cases
26 where the logs in said rafts are to be sold and disposed of in the market they are scaled or caused to be scaled by the parties interested therein so as to make it appear that the logs in said rafts are much greater in quantity than is actually the case.

That the only way to prevent such errors and mistakes as herein set forth, whether the same be intentional or otherwise, and to obtain a true and correct scale of logs passing through said booms is to have a scale and survey made thereof by some competent, responsible,

and disinterested person, whose duty it is to make the same carefully and correctly, and that, realizing this fact, the legislature of said State has duly passed said laws in relation to surveying and scaling as hereinbefore referred to, by which it is made the express duty of this defendant in his district and other surveyors general in their respective districts in said State to make an official scale and survey of the logs coming into such boom or booms of a similar nature within their respective districts, and, furthermore, to keep a true and correct public and official record of all acts done and proceedings had and taken in connection with such scaling, and that said law has in all respects proved to be of great benefit to the people of this State and of other States.

That the logs which passed through said boom at said West Newton slough are cut upon the banks of said Mississippi river and its tributaries, including the logs in question herein, and are floated down said stream by the owners thereof in the ordinary course of business for the purpose, among other things, of transporting them to mills, when they are sawed into lumber, and also for the purpose of marketing them; that as said logs are so floated down said streams it has been found to be, as the fact is, that it is for the best interests of the owners thereof and all persons, firms, and corporations interested therein that they should be gathered together in some safe and convenient place and assorted, brailed, and handled, as aforesaid, and that they should then and there be scaled, surveyed, measured, and inspected for the purpose, among other things, as aforesaid, of ascertaining the amount of merchantable lumber in each log contained and keeping a true and correct
27 record, description, and account thereof, and the ownership and possession thereof for the benefit of the owners thereof, and all persons, firms, or corporations interested therein in case of loss and otherwise, and that said boom in said slough has been particularly recognized and selected as the safest and most convenient spot on said streams to handle, assort, and measure said logs, as aforesaid, and for a number of years last past it has been used exclusively for such purposes, as aforesaid, and when said logs are first cut down and put into said streams the owners thereof understand and know, and said plaintiffs in said action, if they owned said logs, well knew and understood when they were floated down said streams that they were and are to be floated through said slough and said booms for the purpose aforesaid, and that they will be gathered, assorted, brailed, and handled, and that they must be measured, scaled, and surveyed therein for the purposes aforesaid, and that under and pursuant to the laws of said State of Minnesota true and correct public records of the scaling, surveying, measuring, and marking of said logs and the numbers and quantities thereof, with the quality of merchantable lumber in each, would and will be kept.

And said defendant, further answering, alleges that said logs run through said boom in said West Newton slough in such large quantities and with such a diversity of ownership that it has been and is absolutely impossible for the surveyor general of said fourth dis-

trict to personally perform all the work and duties laid upon him' and it is and has been necessary during all the term of office of said defendant for him, as such surveyor general, to employ a large force of men and deputies in and about said work in order to carry on the same, and that it has become and was necessary for him during his said term of office to build a large and expensive camp to care and provide for said men, and that this defendant has been obliged to and has paid out and expended in and about the scaling and surveying of said logs running through said boom during his term of office and in caring for his said men and deputies a very large sum of money.

28 And said defendant, further answering, alleges that in the month of May, 1893, said defendant scaled and surveyed 38,716,510 feet of logs running out of said boom in the manner provided by law, and at the end of said month this defendant duly made out and delivered to the owners of said boom and the managing agent thereof a true and correct scale bill, stating the date of such survey, the number of logs so surveyed and measured, the marks thereon, respectively, and the number of feet of each mark so surveyed during said month and duly signed the same under his hand and seal, and thereupon immediately recorded such bill in the books of his office kept, as aforesaid, all in the manner provided by law, and before the delivery of said scale bill, as aforesaid, and for the purpose of securing to this defendant the payment of his fees, as provided by law, this defendant duly affixed to said scale bill a true statement of the amount due him thereon, to wit, the sum of $1,935.32, and that he scaled such logs relying upon such lien, and that he claimed a lien thereon for such amount and the costs of collection, and thereupon this defendant, as such surveyor general, duly took actual possession of the logs in said complaint referred to and scaled by him, as aforesaid, viz., brail numbered 2222, and referred to in said plaintiff's complaint herein, and that said brail then and there contained 1,020 logs, which scaled 125,320 feet, and also brail number 2228, referred to in plaintiff's said complaint herein, which then and there contained 993 logs, which scaled 126,880 feet, and also brail numbered 2272 and referred to in said plaintiff's said complaint herein, which then and there contained 1,052 logs, which scaled 128,240 feet, and also that certain brail numbered 1030, referred to in plaintiff's said complaint herein, which then and there contained 541 logs, which scaled 63,120 feet, and that certain other brail of logs numbered 1637 and referred to in plaintiff's said complaint herein, which then and there contained 554 logs, and which scaled 67,350 feet, and also that certain other brail of logs numbered 2304 and referred to in plaintiff's said complaint herein, which then and there contained 1,057 logs, which scaled 134,430 feet, and that certain other brail of logs num-

29 bered 2407 and referred to in plaintiff's said complaint herein, which then and there contained 996 logs, and which scaled 137,170 feet, and also that certain other brail of logs numbered 2387 and referred to in plaintiff's said complaint herein, which then and there contained 965 logs, which scaled 130,000 feet, and that

certain other brail of logs numbered 2470, referred to in plaintiff's said complaint herein, which then and there contained 980 logs, which scaled 137,270 feet; that each of the said brails contained the said number of logs and the said number of feet hereinbefore set forth, and no more.

And that said logs and each and every part thereof were duly retained by him as such surveyor general as aforesaid up to the time of the commencement of this action, when they were taken by the United States marshal under his said writ issued herein as hereinbefore set forth and not otherwise; that each and every of said logs was duly surveyed and measured by this defendant, and that in surveying and measuring the same and each and every thereof this defendant made such allowance for hollow, rotten, and crooked logs as would reduce and make them equal to good and sound and straight merchantable logs, and at the time of making such survey and said measurement this defendant duly entered the figures showing such survey in pass books kept for that purpose, and that said books have been preserved and filed by this defendant in his office for the inspection of all persons interested therein, and this defendant in scaling and measuring said logs and each and every thereof used in making said survey and measurements what is known as Scribner's rule and was governed thereby in each instance in making his said survey and measurements, and that every log surveyed by him as aforesaid was so surveyed by the largest number of even feet which it contained in length over ten feet and under twenty-four feet, and all logs of 24 feet length or more were duly surveyed by him as two logs or more.

And said defendant, further answering, alleges that in the month of June, 1893, said defendant scaled and surveyed 183,062,290 feet of logs running out of said boom, in the manner provided by law, and at the end of said month this defendant duly made out and delivered to the owners of said boom and the managing agent thereof a true and correct scale bill stating the date of such survey, the number of logs so surveyed and measured, the marks thereon respectively, and the number of feet of each mark so surveyed during said month, and duly signed the same under his hand and seal and thereupon immediately recorded such bill in the books of his office, kept as aforesaid, all in the manner provided by law, and before the delivery of said scale bill as aforesaid and for the purpose of securing to this defendant the payment of his fees as provided by law this defendant duly affixed to said scale bill a true statement of the amount due him thereon, to wit, the sum of $9,153.10, and that he scaled such logs relying upon such lien, and that he claimed a lien thereon for such amount and the costs of collection, and thereupon this defendant, as such surveyor general, duly took actual possession of the logs hereinbefore and in said complaint referred to, being the same logs scaled by him as aforesaid, and that said logs and each and every part thereof were duly retained by him as such surveyor general as aforesaid up to the time of the commencement of this action, when they were taken by the United States marshal under his said writ issued herein as here-

inbefore set forth, and not otherwise; that each and every of said logs was duly surveyed and measured by this defendant, and that in surveying and measuring the same and each and every thereof this defendant made such allowance for hollow, rotten, and crooked logs as would reduce and make them equal to good, sound, and straight merchantable logs, and at the time of making such survey and said measurement this defendant duly entered the figures showing such survey in pass books kept for that purpose, and that said books have been preserved and filed by this defendant in his office for the inspection of all persons interested therein, and this
31 defendant in scaling and measuring said logs and each and every thereof used in making said survey and measurements what is known as Scribner's rule and was governed thereby in each instance in making his said survey and measurements, and that every log measured by him as aforesaid was so surveyed by the largest number of even feet which it contained in length over ten feet and under twenty-four feet, and all logs of 24 feet length or more were duly surveyed by him as two logs or more.

And said defendant further alleges that at the time of the commencement of this action and the taking of said logs by said marshal, as hereinbefore set forth, this defendant was claiming said logs and holding and retaining the same under and by virtue of his said lien, and that neither said plaintiff nor any one else had any right, power, or authority to take the same or any thereof until they had paid to this defendant the sum of $11,088.92, being the amount due said defendant for services on said logs, together with ten per cent. thereof, to wit, the sum of $1,108.89, costs of collection, as provided by law, and that said defendant has claimed at all times herein mentioned since the original taking of said logs by him, the said defendant, as aforesaid, and each and every part thereof, and still claims a lien upon said logs and each and every part thereof for the amounts hereinbefore specified.

Wherefore said defendant prays a return of said property and each and every part thereof, or if that cannot be had that he have and recover from said plaintiff the amount of $12,197.81, with interest thereon, and also the costs and disbursements of this action.

Aug. 11, 1893.

J. F. McGOVERN &
WARNER, RICHARDSON & LAWRENCE,
Attorneys for Defendant, St. Paul, Minnesota.

32 STATE OF MINNESOTA, } ss:
County of Ramsey, }

John H. Mullen came before me personally, and, being duly sworn, doth say that he is the defendant in the above-entitled action; that the foregoing pleading is true of his own knowledge except as to matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

JOHN H. MULLEN.

Subscribed and sworn to before me on this 31st day of August, 1893.

HARRIS RICHARDSON,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

(Endorsed:) Answer. Filed Aug. 31st, 1893. Oscar B. Hillis, clerk, by J. M. Sheardown, deputy.

33 United States Circuit Court, District of Minnesota, First Division.

LINDSAY & PHELPS COMPANY (a Corporation), Plaintiff,
vs.
JOHN H. MULLEN, Defendant. } Reply.

Plaintiff replies to the new matter in the answer.

First. That, except as hereinafter admitted, it denies the same and each and every allegation and part thereof.

Second. It admits and avers that since the commencement of this action the United States marshal, as by law he was required to do, took from the possession of defendant the property described in the complaint and delivered the same to the plaintiff; that there is at and opposite the county of Wabasha, in the State of Minnesota, a short distance below the mouth of the Chippewa river, an arm of the Mississippi river called and know- as West Newton slough, through and into which annually flow and pass logs in great numbers and of many different marks, and many of said logs are there made into brails or rafts, as hereinafter more fully and particularly alleged.

Third. That this defendant has for many years last past owned and operated a saw-mill at the city of Davenport, Iowa, on the bank of the Mississippi river, and he and a number of other persons owning saw-mills on the bank of said river below the mouth of the said Chippewa river, in the States of Minnesota, Wisconsin, Iowa, Illinois, and Missouri, have found it necessary for a number of years last past to obtain and have obtained line logs, to be manufactured into lumber at their mills, on lands adjacent to the Chippewa river in the State of Wisconsin, and they have floated or driven or transported said logs down said last-named river into the Mississippi river and down the Mississippi river to their respective mills; that it is not practicable to drive or transport said logs down the said Chippewa river in brails or rafts or otherwise than loose or
34 down the Mississippi river otherwise than in brails or rafts, and it has been found to be much more economical for the owners of said saw-mills and logs to co-operate in the driving and transporting of their logs to their mills than to do the same separately.

That therefore, solely to facilitate the driving and transporting of said logs and as a matter of economy, many of the owners of said mills upon the bank of the Mississippi river below the mouth of the Chippewa river a number of years ago organized and incorporated,

in the State of Iowa, a company known and styled as the Mississipp River Logging Company, and the said last-named company, before the transaction referred to in the complaint, caused to be organized in the State of Minnesota a company known as the Minnesota Boom Company; that said boom company was organized with the understanding, belief, and hope that the United States would sanction, approve, and authorize the operation of the same at and in said arm of the Mississippi river called West Newton slough, but the United States did not approve or authorize the same, but, on the contrary, refused and declined to do so; that said boom company has not erected nor has it maintained any piers or structures in said river; that all such piers, booms, or structures as have been erected or maintained in the name of said boom company in or near said river were erected and have been and are maintained by and at the expense of the said Mississippi River Logging Company and solely and only to facilitate the speedy and economical floating and transporting of the logs of its stockholders down the said river to their respective mills, and all the structures, works, and property in said slough and all the riparian and other rights there owned or used for the holding, rafting, or brailing of logs or for facilitating the floating or transporting of the logs down the said river were purchased or erected by, and ever since have belonged to, the said Mississippi River Logging Company, and said structures, booms, piers, and works in said river are only permitted by the United States to remain there by sifference and subject to be removed at any time; that neither the said boom company nor said Mississippi River Logging Company nor any one has ever had any legal right or authority to drive or float into said slough or arm of the river or to there keep, detain, or hold, in any boom or otherwise, or to there brail or raft any logs of any other person without such person directing or authorizing them so to do or consenting thereto.

Fourth. That said Mississippi River Logging Company and certain lumber manufacturers at or near Eau Claire, in the State of Wisconsin, before the transaction in the complaint referred to, solely for the purpose of aiding in the speedy and economical driving and transporting of their logs from the said Chippewa river, in the State of Wisconsin, to their respective mills, caused to be organized and incorporated in the State of Wisconsin a company known as and styled the Chippewa Logging Company, by or in whose name logs were purchased for its respective stockholders in proportion to the stock owned or money contributed by each, and each was entitled to receive of such logs so purchased an amount or number of feet to be ascertained according to a plan or arrangement agreed upon between them, as hereinafter more fully stated, proportionate to his contribution to the capital or money so used, and the said Mississippi River Logging Company also purchased and held in its name logs for its several stockholders in proportion to the sum by them respectively contributed; that logs purchased and held in the name of the Chippewa Logging Company were delivered to its respective stockholders, viz., to those owning mills on

the bank of the Chippewa river, as the logs floated down said river or past their said mills, and to the Mississippi River Logging Company after said logs floated down said Chippewa river below Eau Claire, and ordinarily at said arm of the Mississippi river called West Newton slough; that the stockholders of the said Chippewa Logging Company and of the said Mississippi River Logging Company agreed and arranged among themselves that the number of feet of logs to be delivered to each should be measured and determined according to a plan or rule agreed upon and adopted by them, and which was found to be equitable, just, and con-
36 venient; that each and every of the arrangements and acts or things done, as aforesaid, was made and done solely to aid in the speedy, economical, and uninterrupted transportation of the said logs from the place in Wisconsin where they were purchased and cut, as aforesaid, to the mills of the owners, and solely and only as a means to that end; and, the arrangements aforesaid having been found to be great aids in the speedy and economical transportation of the logs down said rivers, certain individual sawmill owners at times hired the said Mississippi River Logging Company to drive or transport logs owned by them down said rover to their respective mills.

Fifth. That this plaintiff, prior to the transaction in the complaint and answer set forth, was owner of the logs described in the complaint, at the head-waters of the said Chippewa river, which the said Mississippi River Logging Company agreed with this plaintiff to drive and transport down said Chippewa river and to said West Newton slough and there to brail and raft and deliver them to this plaintiff, which it did, which logs so then and there delivered to this plaintiff are the very logs in question in this suit.

Sixth. That when the said logs were put into the Chippewa river at the place where they were purchased, as aforesaid, it was intented and understood by all parties interested thereon or having charge or control of the same that they should be, and but for the illegal seizure and detention thereof by the defendant they would have been, transported and floated to the mills at which they were to be manufactured, as aforesaid, without delay, stoppage, or interruption, except so far as the same might be necessary to do such acts as should be required in order to float, drive, or transport them safely and expeditiously to their destination.

Seventh. That of all the logs passing through said West Newton slough at least ~~thirty~~-nine per cent. were and are floated out of said State of Wisconsin down said Chippewa river, and at least eighty per cent. thereof were and are destined for and floated or transported to points outside of said States of Wisconsin or Minnesota.

37 Eighth. That defendant claims to have been at all the times referred to one of the surveyors of logs of the State of Minnesota, appointed for the district of which the county of Wabash is a part, and claims to have scaled or measured said logs, and he took possession of them and held and claims the right to hold them, not only for the fees which he alleged were due for scaling

them, but also for the fees which he claimed to be due for the scaling of many millions of feet of other logs in said slough.

Ninth. That neither the plaintiff nor any one having any interest in or control or dominion over or any right to such control or dominion of said logs requested or authorized defendant to measure or scale the same or consented that he should do so, nor did nor does any law of the State of Minnesota give him any right or authority to scale or measure them or any logs passing through said West Newton slough or give him any lien upon them for scaling or measuring them or for scaling or measuring any other logs, nor under the laws or Constitution of the United States had or has the State of Minnesota any right, authority, or power nor could it have any authority or power to authorize the defendant or any other State officer to scale or measure said logs at the expense of the plaintiff or to obtain a lien upon them or detain or hold them for such scaling; that the transporting of such property from one State to another in commerce between the States, and therefore can only be regulated by Congress, and no State can legally in any manner interrupt or interfere with or burden or tax the same.

Tenth. That the said Chippewa river and the said Mississippi river are, and each of them is, navigable waters of the United States, and have been taken control of and are, and for many years last past have been, regulated and improved at great expense by the United States, and the said arm of the Mississippi river called West Newton slough is a navigable arm of said river, and neither the State of Minnesota nor any other State past which said Mis-
38 sissippi river flows had or has any right to interfere with the navigation or improvement thereof.

THOMAS SIMPSON,
THOMAS WILSON,
Plaintiff's Attorneys, Office of Thomas Simpson, Winona, Minn.

STATE OF MINNESOTA, } ss:
County of Winona, }

Thomas Simpson came before me personally, and, being duly sworn, doth say that he is the plaintiff's attorney in the above entitled action; that the foregoing reply is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said plaintiff is that it is absent from the county of Winona, Minnesota, where resides its said attorney.

THOMAS SIMPSON.

Subscribed and sworn to before me on this 26th day of September, A. D. 1893.

[NOTARIAL SEAL.] A. W. LAIRD,
Notary Public in and for Winona County, Minnesota.

(Endorsed:) Reply. Filed Sept. 27th, 1893. Oscar B. Hillis, clerk, by J. M. Sheardown, deputy.

39 United States Circuit Court, State of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, a Corporation, Plaintiff,
vs.
JOHN H. MULLEN, Defendant.

Now comes the State of Minnesota, and for answer to the complaint of the plaintiff in the above-entitled action adopts the answer of the defendant Mullen as its answer so far as applicable.

Further answering, the State of Minnesota alleges that on the 12th day of February, A. D. 1895, the said defendant, Mullen, duly assigned, transferred, and delivered to the State of Minnesota all his right, claim, and interest in said cause of action against the said plaintiff and his right to the property described in plaintiff's complaint; that ever since said date the State of Minnesota has been the owner and holder of said claim, interest, right, and title to the property described in the complaint by virtue of said assignment, and is still the owner thereof; that no part of the fees for services rendered, which are fully set forth in the defendant's answer, have been paid to the State of Minnesota.

Wherefore the State of Minnesota demands judgment for the return of said property, or, if that cannot be had, that it recover from said plaintiff the sum of $12,197.81, with interest, together with its costs and disbursements.

H. W. CHILDS,
Attorney General, and
GEO. B. EDGERTON,
Att'ys for State of Minnesota.

40-59 STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

H. W. Childs, being first duly sworn, deposes and says that he is the attorney general of the State of Minnesota and one of the attorneys in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true, except as to matters therein stated on information and belief, and as to them he believes it to be true.

H. W. CHILDS.

Subscribed and sworn to before me this 14th day of August, A. D. 1897.

[NOTARIAL SEAL.] ANDREW ——,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Answer of State of Minnesota. Filed Aug. 16th, 1897. Henry D. Lang, clerk.

* * * * * * *

60 *Term Minutes, June Term, A. D.* 1897.

United States Circuit Court for the District of Minnesota.

AUGUST 19TH, 1897.

LINDSAY & PHELPS COMPANY
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA. } E. Law. 1153.

Thereupon it is considered, ordered, and adjudged that the above-named plaintiff take nothing by this its action, and that the above-named defendants, The State of Minnesota and John H. Mullen, do have and recover of and from the above-named plaintiff, Lindsay & Phelps Company, the return of the following-described property, to wit:

"One full brail of pine logs, numbered 2222, containing 1,064 logs, which scale 134,160 feet;

One full brail of pine logs, numbered 2228, containing 1,007 logs, which scale 132,120 feet;

One full brail of pine logs, numbered 2272, containing 1,071 logs, which scale 133,650 feet;

One narrow brail of pine logs, numbered 1030, containing 598 logs, which scale 70,650 feet;

One narrow brail of pine logs, numbered 1637, containing 658 logs, which scale 68,130 feet;

One full brail of pine logs, numbered 2304, containing 1,046 logs, which scale 138,230 feet;

One full brail of pine logs, numbered 2407, containing 1,004 logs, which scale 143,270 feet;

One full brail of pine logs, numbered 2387, containing 1,020 logs, which scale 141,380 feet;

One full brail of pine logs, numbered 2470, containing 990 logs, which scale 144,270 feet;"

or in the failure to return said property that the above-named defendants do have and recover of and from the above-named plaintiff the sum of $13,197.81, with interest thereon, at the rate of 7 per cent. per annum, from the 11th day of August, 1893, amounting to the sum of $3,434.32, and amounting in the aggregate to the sum of $15,632.13, together with its costs and disbursements herein, to be taxed, and that it have execution therefor.

Thereupon, upon motion of plaintiff's attorney, it is ordered that execution herein be, and the same hereby is, stayed for the period of forty-two (42) days from and after the date hereof.

(Entered, Term Minutes, vol. 16, page 124.)

61 Circuit Court of the United States, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff,
vs.
JOHN H. MULLEN and STATE OF MINNESOTA, Defendants.

Petition for a New Trial.

To the honorable the circuit court of the United States for the district of Minnesota, third division, and the judges thereof:

The plaintiff in the above-entitled action respectfully petitions this honorable court and the judges thereof for a new trial in said action upon the following grounds:

First. That the findings and judgment in said action are not, nor are either of them, justified by the evidence, and that they are both contrary to law.

Second. Errors in law occurring at the trial and excepted to by the plaintiff.

Third. That the judge who tried said cause should have found for the plaintiff.

Fourth. No findings by the court, either special or general, sufficient to support the judgment in said cause have ever been made.

Fifth. For errors in law committed by the court in its final decision of said cause, and for divers other grounds of error appearing in the record of said cause and in the bill of exceptions, which is hereby made a part of this petition.

Said motion will be made and founded upon this petition, th pleadings, files, records, and all the papers in said cause, togeth with the settled bill of exceptions and the stenographer's minutes f the evidence, all of which will be read on said motion by plaintiff's counsel in support of the same.

THOMAS SIMPSON,
CLAPP & MACARTNEY,
Attorneys for Plaintiff.

62 DISTRICT OF MINNESOTA, *ss:*

Newel H. Clapp, being by me first duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that the foregoing petition is true and is made in good faith and not for the purpose of delay.

NEWEL H. CLAPP.

Subscribed and sworn to before me this 27th day of September, A. D. 1897.

BELLA C. RANKIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

July General Term, 1897.

Present: Hon. William Lochren, judge.

I hereby certify that I have read the foregoing petition for a new

trial made by the plaintiff in the foregoing-entitled action, and that I allow the same to be filed in said action in this court.

Dated September 28, 1897.

WM. LOCHREN, *Judge.*

(Endorsed:) Petition for new trial. Filed Sept. 28th, 1897. Henry D. Lang, clerk, by Louise B. Trott, deputy.

63 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff,
vs.
JOHN H. MULLEN and STATE OF MINNESOTA, Defendants.

The plaintiff's motion for a new trial having this day come on to be heard upon the petition therefor filed herein and the minutes of the court, and the court having heard and considered the arguments of counsel, it is hereby—

Ordered that said motion be, and the same is hereby, denied.

Dated this 8th day of January, A. D. 1898.

WM. LOCHREN,
District Judge.

(Endorsed:) Order denying motion for a new trial. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

64 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants.

GENTLEMEN: You will please take notice that attached hereto is the plaintiff's proposed bill of exceptions in the above entitled cause.

Dated Nov. 11th, 1897.

THOMAS SIMPSON &
CLAPP & MACARTNEY,
Plaintiff's Attorneys.

To Messrs. Warner, Richardson & Lacrence, attorneys for defendants, and to Hon. H. W. Childs, attorney general.

65 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff,
vs.
JOHN H. MULLEN and STATE OF MINNESOTA, Defendants.

Bill of Exceptions.

The above-entitled action, being then pending against the defendant John H. Mullen alone, came on for trial before the Hon.

William Lochren, United States district judge for the district of Minnesota, at a regular term of the United States circuit court held at St. Paul, Minnesota, on the 11th day of August, A. D. 1897, a jury having been waived and the case tried by the court pursuant to the written stipulation of all parties.

Messrs. Clapp & Macartney and Thomas Simpson, Esq., appeared for the plaintiff.

Messrs. Warner, Richardson & Lawrence for the defendant.

Hon. H. W. Childs, attorney general of the State of Minnesota, appeared and made the following statement:

This case grows out of an attempt made by the surveyor general of the district of Minnesota to inspect and survey certain logs during the months of May, June, July, and August during 1893, and he attempted to secure the payment of his fees by the seizure of a certain quantity of logs. These logs were replevined by the plaintiffs in the several actions. The claim of the surveyor general, Mr. Mullen, the defendant here, was assigned to the State of Minnesota in consideration of an appropriation made by the State of Minnesota to him by the legislative session of 1895. I therefore move that the State of Minnesota be made a party to this action.

Counsel for the plaintiff consented to the granting of said
66 motion, provided the fact that the State of Minnesota has been made a defendant shall not in any way prejudice any rights that the plaintiffs might have in this case if the State of Minnesota had not been made a defendant.

The COURT: The State, I suppose, has no claim except as the assignee of the defendant?

Mr. CHILDS: That is all, as I understand it. I appear for the State and Mr. Edgerton also.

The COURT: You may file such papers as are necessary to carry this agreement into effect.

Thereupon the attorney general, on behalf of the defendant State of Minnesota, made and filed the following answer:

STATE OF MINNESOTA:

United States Circuit Court, Third Division.

LINDSAY & PHELPS COMPANY, a Corporation, Plaintiff,
vs.
JOHN H. MULLEN, Defendant.

Now comes the State of Minnesota, and for answer to the complaint of the plaintiff in the above-entitled action adopts the answer of the defendant Mullen as its answer, so far as applicable.

Further answering, the State of Minnesota alleges that on the 12th day of February, A. D. 1895, the said defendant, Mullen, duly assigned, transferred, and delivered to the State of Minnesota all his right, claim, and interest in said cause of action against the said plaintiff and his right to the property described in plaintiff's complaint; that ever since said date the State of Minnesota has been

the owner and holder of said claim, interest, right, and title to the property described in the complaint by virtue of said assignment, and is still the owner thereof; that no part of the fees for services rendered, which are fully set forth in the defendant's answer, have been paid to the State of Minnesota.

Wherefore the State of Minnesota demands judgment for the return of said property, or, if that cannot be had, that it recover from said plaintiff the sum of $12,197.81, with interest, to-
67 gether with its costs and disbursements.

H. W. CHILDS,
Attorney General, and
GEO. B. EDGERTON,
Att'ys for State of Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

H. W. Childs, being first duly sworn, deposes and says that he is the attorney general of the State of Minnesota and one of the attorneys in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true, except as to matters therein stated on information and belief, and as to them he believes it to be true.

H. W. CHILDS.

Subscribed and sworn to before me this 14th day of August, A. D. 1897.

ANDREW ERWIN, [SEAL.]
Notary Public, Ramsey Co., Minn.

(Endorsed:) Answer of State of Minnesota. Filed Aug. 16th, 1897. Henry D. Lang, clerk.

Thereupon plaintiff, to maintain the issues on its part, offered in evidence the deposition of STANLEY CAMPBELL, who testified as follows:

I live at Swan River, Minnesota. My business is scaling logs. I have been engaged in that business ten or twelve years.

I was in the employ of the Chippewa Logging Company, scaling logs at West Newton slough, in the summer of 1893. I had been there two summers before for Mr. Smith, and I was scaling one summer for McKenzie, not at West Newton, but on the same
68 works, at Beef slough. I worked there during the entire rafting season of 1893.

An outside party's logs are scaled straight and sound; pool logs we scale full.

By pool logs I mean Chippewa Logging Company's logs, and outside logs are logs belonging to all parties other than the Chippewa Logging Company.

By scaling full I mean for the full contents—what is in the logs—what the rule gives us—without any reference to the character of the log, no matter what it is.

By scaling straight and sound I mean give the sound contents of

the log, whatever I think is in the log of merchantable lumber, making such deductions as I think necessary for rot, crook, and other defects, whatever I see.

I did not put down anywhere a memorandum of the amount and mark of each log that I scaled. The tallyman did. The duties of the tallyman are to take the amount of the logs as we call them to him and set them down under the marks that we call on a piece of paper called a tally-sheet.

There is one tallyman to two scalers. The three men work together all the time.

Q. Now, it appears that you scaled or assisted in scaling three brails of logs that are in dispute in this case—brails number 2222, 2304, and 2387. Have you any personal recollection whether you scaled those logs or not—those brails?

A. I know I scaled on that chance through there where those logs run.

I don't mean the logs in this particular number of brails. I know I scaled there.

The witness was then shown the original tally-sheets of
69 the three brails above mentioned. He testified:

I recognize the marks of logs that are put down there. I remember scaling logs of those marks. These logs are what I have denominated as outside logs. I know they are outside logs by the marks.

If I scaled the logs that are put down on that tally-sheet I scaled them straight and sound. If I scaled the logs which are put down on that tally-sheet or any of them I called out to the tallyman accurately the amount of feet, as I determined it to be, in each log, and the marks which I found upon it.

The tallyman, in order that we may know whether or not he understands what is called out to him when we call him the number, he answers it right back to us. We call him the mark, then the number of feet that is in the log, and he answers right back.

In scaling, in order that the scalers do not get mixed up and one man scale the other man's logs, one commences on one side of the tier of logs and one on the other, and we work towards each other, and when we get towards the center we tell each other which log we have got. Then we start right from the center and go back to the outside again.

One man works on one side of the center and one on the other, one on each side of the brail.

We always try and hunt for the right mark; we don't ever give a mark unless it is right; at least we don't intend to.

I had been familiar with the marks which were used on logs cut on the Chippewa river at that time—in the summer of 1893—possibly ten or twelve years.

In the brails of outside logs, such as there were, if we found a log worthless the mark is put down and it is culled—marked as a
70 cull. We do not scale it to the mark; don't put any amount down; just cull it.

In calling out the amount of feet in a log we do not call out the

full amount. We leave the cipher off. I mean by that, twenty-one, that would be two hundred and ten. We put down the twenty-one and leave off the ten. We leave off the cipher that represents the unit.

On cross-examination the witness testified as follows:

I was working for the Chippewa Logging Company. L. P. Smith hired me. He is the man that looks after the scaling there—the man that hires us. I suppose he works for the Chippewa Logging Company. I cannot answer how I know. I do know. He may have worked for a dozen other people that season, for all I know. I don't know. I don't think when he hired me, I might have worked for a dozen people.

The fact that Mr. Smith hired me is not the only reason I have for thinking he worked for the Chippewa Logging Company. The reason I know is that Mr. Smith hired and the Chippewa Logging Company paid me in cash. Mr. Smith paid me. I know I was working for the Chippewa Logging Company, because Mr. Smith said so.

I can't tell you the members of the Chippewa Logging Company. Mr. Frederick Weyerhaeuser is one. I think he lives in St. Paul. I don't know what he has to do with the company. I have seen his name as a member of the company on the bill-heads and other places. That is all I know about it.

Mr. Smith hired me in the spring of 1893. I can't just remember where. There wasn't anything said when he hired me, just that it was understood that I worked there summers, and he told me what time to be ready to go to work at West Newton.

71 There was nothing said about the amount of pay. I knew what we generally got. I had worked for Mr. Smith two summers before.

By outside logs I mean other logs than pool logs or company logs. By pool logs I mean the Chippewa Logging Company logs. The reason why I call them pool logs is that that is the name we got for them. That is what everybody calls them that works down there. I don't know why. I might have heard, but if I have I have forgotten what it is. I presume they do call them Chippewa Logging Company logs, possibly; that is only an expression they use—"pool logs." I can't tell when I first heard it. We call the logs down there pool logs and outside logs and company logs. Company logs are the Mississippi River Logging Company logs, as I understand it. Possibly that is another of Mr. Weyerhaeuser's companies.

I was not working for the Mississippi River Logging Company. I was working for the Chippewa Logging Company, so far as I know.

There are no other kinds of logs except outside logs, pool logs, and company logs. I am just as sure of that as I am of all the other matters that I have testified to.

I scaled on all kinds of logs—on all marks of logs that run in there.

I can't tell you whether it is because the Mississippi River Log-

ging Company is in the pool, and the Chippewa Logging Company is in the pool, that there are called pool logs.

I don't remember when I began work there that season. I can't tell exactly when I quit; think it was in August, some time.

I used the Lufkin rule. I distinguish outside logs from pool logs by the marks on the log. We see the mark on the log
72 and know whether it is a pool log or an outside mark. I know by the mark on the log what is an outside log and what is a pool log. I know because I know what marks belong to the pool and what marks belong to the outside logs. I know by looking at them. When I see a mark on a log I know where it belongs.

If you took me out on the river and showed me a log with a mark on it I could tell where it belongs. I get familiar with the log marks by working on them and learning them. I learn them by looking at the logs with the marks. I first saw a log with a pool mark on it the first year there was a pool log put out. I can't remember what year that was. I can't say how the first log I saw with a pool mark was marked. I knew it was Chippewa Logging Company's logs, because I was working for them; was working on the South fork of the Flambo river. I forget whether that is in Sawyer or Taylor county.

I don't claim to be an expert. I don't think I can tell you offhand if I was taken out into any stream in Minnesota and shown a log with a mark on it who owns that log. There was a time when I had not seen a pool log. I learned the mark by looking. We always get all pool marks when anybody gives them to us. I know where we get the marks in the spring. Mr. Smith gives us the new pool marks in the spring. I can't tell when he gave them to us in the spring of 1893; not until we went to work. I don't know where the list is. The list was made of just the marks on a paper. After I got the paper I took the marks off and put them in a book. I carry that book. I don't know whetherI have got that book now; can't tell you what I did with it. The marks varied from spring to spring. All I knew about the marks was when they gave me the new marks. All I knew was what Mr. Smith told me. I
73 did not say so in the first place, because you did not ask me.

We scaled some of these logs straight and sound and others full, because that is our instructions. I can't tell you why these were our instructions. When I scale a log straight and sound I scale it something by guess. I get about what I think is in it. I don't pretend to give the exact figure. I don't claim that I can see through a log and tell just what it is. We scale to the best of our knowledge; what we think is right. When we scale full we come pretty close to it; give whatever it shows on the rule. I never scaled with another man, both scaling the same log at the same time. I have had a test of my scaling by having scale made over after me, full scale both ways, lots of times. I don't know how nearly correct I come when amounts scale full.

I am working in the woods now for the Pine Tree Lumber Company. Mr. Weyerhaeuser is connected with that company.

By saying I don't know how near correct I am when I scale full, I mean when I scaled full I would know I was correct, but I wouldn't give any more than what the rule gives the log. It would be the correct, full scale; but unless I scaled the same brail over straight and sound I would not be able to tell how much sound lumber, in my judgment, was in the same amount of logs.

Plaintiffs then offered in evidence the deposition of F. H. BOARDMAN, who testified that he was a scaler who had had considerable experience in scaling logs on the Chippewa river and its tributaries. The witness then testified that he scaled logs at West Newton in the summer of 1893; that he scaled some of the same logs at
74 West Newton that he had previously scaled upon the Chippewa river in the woods. He further testified that the scaling was done substantially in the same manner as had been testified by the witness Campbell.

He testified further that during the period of his employment as a scaler at West Newton booms in 1893 or at any time prior thereto he never called out to the tallyman any different number of feet as the amount he determined to be in any log than the amount he found out by the scale rule where he was scaling full or by the scale rule and making such deductions as his judgment called for where he scaled straight and sound, and that he never had any instructions or any intimations from any of his employers that he was in any instance to make anything other than a fair and honest scale according to his best judgment.

He was shown the original tally-sheets of brails No. 2222, 2304, and 2387, and testified that he remembered scaling logs of the marks that were put down on those sheets at West Newton in the year 1893; that he scaled those logs straight and sound; that the rule used was what was known as a modified Scribner rule; that it is the same rule that is in use in the States of Wisconsin and Minnesota as the Scribner rule; that the modification is this: where the figure 5 occurs, for instance, it is 55—the log scales 55 feet—we will assume we call the log 50 feet; if the log would scale 56 feet we would call it 60 feet. The 5 is always thrown off—that is, there is four numbers goes ahead and five numbers back. If it scales anything over five it goes to the next ten; anything less, the five included, goes back to the ten before.

Plaintiffs, to further sustain the issues upon its part, offered in evidence the deposition of ROY ACHENBACH, who testified:

I live in Alma, Wisconsin; am twenty-one years old. I am a barber by trade. I have worked at West Newton about five
75 years, tallying every year, during the entire season that the booms have been running.

What we call tallying is having a sheet and get onto a brail of logs. There are two men measure the logs, calling them by turn, and the tallyman answers the calls so that the scaler knows he has got them and puts them down on these sheets.

That sheet is called a tally-sheet. The scalers call the marks and

the amount of the logs, how many feet there is in the logs. The tallyman takes those by turn the way the scaler calls them to him and puts down the mark of the log and number of feet as they are called out. I was tallying here at West Newton booms in the summer of 1893; all summer during the times the booms were running. The scalers did not call out the full amount on the sheet; for instance, there is a log of 120 feet, we put down 12; the cipher is added in the office when they are footed. The figure representing the unit is always left off when it is put down on the sheet, and when the scalers call it off to the tallyman they call out the same figures as they put down.

Witness was then shown the original tally-sheets of brails Nos. 2222, 2304, and 2387, and testified:

All the figures excepting—those that have been footed up and put on at the bottom are not mine—they have been put on in the office. All these in here are mine, and the signature and the date. All mine except the footings. I put the marks on. The marks on the upper right-hand corner of each one of the tally-sheets mean the number of chains that are in the booms that go around the brails, and the culls are logs that were thrown out altogether; they are culled; a log that is full of punk and one thing and another. We get the culls, find out those numbers, as they are called out to us by the scalers, and simply put down the mark there to represent the fact that there is a cull whenever it is called out to us by
76 the scaler, and there is no further account kept of it in the scaling. In tallying these three brails of logs, the tally-sheets of which are shown me here, I put down correctly in each instance under the proper mark the number of feet that were called out to me, as they were called out to me by the scalers.

We got the numbers that were put on these tally-sheets for the brail numbers when we started in on the brail. There is an extra man hired for that, doing nothing else, going around numbering the brails. The number is placed on the boom, two floating logs—that is, two logs that are not chained. The boom is the string of logs that surrounds the brail.

When I had finished making these several tally-sheets, as far as I made them, I signed them at the time and dated them, and then sent them in to the office. I think I sent them by William Skrieffe, who was, I think, carrying sheets at that time. I don't remember. There was a man provided who makes that his business to carry sheets from the tallyman to the office.

The witness was then shown the original tally-sheet of brail No. 2272 and testified: That is all in my handwriting; the figures and signature, excepting those figures that have been put on in the office—the footings. That sheet was made by me in the same way that I have testified as to the other sheets, and after I had finished my work upon it I signed it and put the date upon it, and then delivered it to the man whose duty it was to carry it to the office. In making that sheet, I put down correctly the number of feet and the mark, as it was called out to me by the scalers whose names are put on the sheet there. In making these various tally-sheets, I have

never intentionally or so far as I know at all put down upon any sheet under any mark of logs any different number of feet
77 than were called out to me by the scalers except sometimes we got one down by mistake and the scalers corrected us, and, so far as I know, wherever any such mistake has been made, it has been corrected before the sheet has gone out of my hands.

The names of Boardman and Campbell, signed to brail No. 2222; Boardman, Ackley, and Campbell, signed to brail No. 2304 and 2387, and the names Sanford and Coleman, signed to brail No. 2272, are the names of the scalers. The signature is in my handwriting. Boardman, whose name is signed here, is Fred Boardman; Campbell, Stanley Campbell; Ackley, Lou Ackley; Sanford, Frank Sanford; Coleman, John Coleman.

On cross-examination the witness testified:

The last time I saw tally-sheet of brail No. 2272 was when I was up to St. Paul last February. I do not remember my figures in here, only because I see my signature. I can tell my figures without the signature. I signed these sheets that have been shown me, the date that has been given on the sheet there. I remember that because I see the date set down there. I don't just remember what kind of a day it was, whether warm or cold.

I know that at the time I tallied those sheets I was doing nothing else but tally those brails that year.

Thereupon plaintiff introduced the evidence of the scalers and tallymen who scaled and tallied the brails of logs mentioned in the complaint other than those mentioned in the testimony of the witnesses Stanley Campbell and Roy Achenbach, showing by such witness the scaling and tallying of all said brails substan-
78 tially in the same manner as testified to by said Campbell and Achenbach.

The plaintiff, to further sustain the issues upon its part, then offered in evidence a part of the deposition of J. B. PHELPS, who testified as follows:

My name is J. B. Phelps. I reside at Davenport, Iowa. I am fifty-seven years of age, and I am secretary and treasurer of the plaintiff company; have held that office five or six years. As secretary and treasurer I did generally anything that is to be done. I have done it all in the office work—that is, at times.

I have knowledge of all of the business of getting logs to manufacture. I did not always do it all, but most of the correspondence in regard to logs to be received.

The plaintiff owned and operated some mills at Davenport, and has during the time of its corporate existence. We got
79 almost all of our logs to manufacture from the Chippewa river and its tributaries both by cutting them and buying them on the bank.

The principal part of the logs we cut in 1893 came through the West Newton booms in that summer. The logs in the brails number as follows: 2222, 2228, 2272, 1030, 1637, 2304, 2407, 2387, and 2470, belonged to our company.

I am familiar with the value of that class of logs. The value of these logs in these brails on the Mississippi river at the time they were taken was not far from $13.00, delivered at our mill. They were worth about $1.10 less at West Newton.

The defendant then offered the following part of the cross-examination of this witness:

I don't think I ever personally saw the particular brails of logs to which Mr. Clapp has called my attention.

The value of logs depends on the character, quality, and size of the log to some extent.

The plaintiff, to further sustain the issues upon its part, called J. F. CHAPMAN, who testified:

I have resided at Minneiska, Minnesota, about seven years.

I resided there in 1893. I was employed by the plaintiff in that year looking after their interests which are at the boom—the West Newton boom. I went to the rafting works every morning and got the numbers of the brails that were rafted, and looked after the fitting up and saw when they were fitted up, and kept the company informed when they would come out and how the logs were coming out of the boom. I kept a record of the brail numbers as they came along. I remember some of their logs having been seized by the defendant Mullen during the summer of 1893. I can tell the
80 date when these logs were seized and give the brail numbers that were seized.

Witness then produced a memorandum, and, being cross-examined at this point with reference to the memorandum by defendant's counsel, testified as follows:

I made a memorandum at the time and have a book for that purpose. I have it here. I am not generally accustomed to have logs seized down there. This book was kept to keep a record of the numbers of the brails as they were rafted out and came out of the rafting works from year to year.

The witness further testified on direct examination:

These logs were seized on the 30th of June. I got that from finding men in charge of the logs at that time, sent there by Mr. John H. Mullen, as I understood it. The brails of the Lindsay Phelps Company seized were numbered 1030, 1637, 2222, 2304, 2387, 2228, 2272, 2407, and 2470.

I know something of the market value of those logs at that time. It was between $12 and $13 per thousand feet rafted.

Those logs were released on the 24th day of August, 1893. They were just above Minneiska at the time they were seized, in places where there were numbers, what we call coupling-up chances, or numbers for coupling up and fitting up the logs. I think these logs were on two numbers, 13 and 15. These numbers mean places or chances for coupling up the logs and making them ready for the boats, temporary harbors. All but two brails of those logs had been coupled up and fitted for the boats when they were taken, when I found these men in possession of them. These two brails

were Nos. 2407 and 2304. After these logs were coupled up
81 and made ready for the boats I had no particular duties in reference to them, only warning our people that the logs were made ready for the boats. I based that information upon actual inspection of the logs in every case.

The last brail was dropped in on the 29th—I believe the 29th of June. I believe that is the same day that Mr. Mullen took them. The others had been there since the 23rd.

On cross-examination the witness further testified:

At that time I was working for the Lindsay & Phelps Company or the La Crosse Association. By the La Crosse Association I mean the association of lumbermen that employed me.

These facts I have given are taken from my memorandum book and are memoranda that were made at the time. I don't have any independent recollection about those brail numbers or the date. I only know what I find set down in my book. I know that General Mullen took those logs on the 30th of June from finding the men there in charge of them. I went there perhaps five or six o'clock in the evening and found his men there then. It might have been later than that; some time in the evening. I had been there before, that morning, early.

He took possession of all the brails, the numbers of which I gave, on the 30th. I can show the memorandum for three brails. All brails I have a memorandum of he took on the 30th are Nos. 2222, 2228, and 2272. These are the only ones that my memorandum shows were taken possession of by Mr. Mullen on the 30th. I made that memorandum at the time. Those three brails were on No. 13. No. 13 is about 1,200 feet from No. 15.

By chances I mean a temporary harbor for coupling logs ready for the boats. There were about 40 chances in all. No. 1 was above, opposite West Newton. They run in numerical order
82 down the river from that point.

Chance No. 13 was about five and a half miles from West Newton.

The reason I have not any memorandum as to when the other brails were seized by General Mullen is that these particular logs were liable to get aground, and I made a note of that fact that they were liable to get aground, and, following that, when they were seized I noted that fact.

When I put down the numbers in my memorandum book the brails were still in the booms, and afterwards I set down against those numbers the dates. I did not keep these three brails separate from the other six brails. I made a separate note of them. I did not do that because the Cable Lumber Company owned some of the logs that were in the six brails.

The Cable Lumber Company was interested in the marks S. A. M. There are only four S. A. M. brails, I believe. I kept them separate because the Cable Lumber Company had an interest in that mark. I think there was one other mark which was upon the logs in these brails in which the Cable Lumber Company was interested, besides this mark S. A. M. I won't be positive.

The two brails that had not been coupled up were on No. 15. There were six brails on No. 15, Nos. 1030, 1637, 2304, 2387, 2407, and 2470.

They usually couple three large or five small brails together into a half raft. At that chance there were two large and two small brails coupled, and two large brails not coupled at all. That is the best of my recollection.

The brails that were coupled were Nos. 1030, 1637, 2387, and 2470. The last brail dropped down there was 2470. No. 2304 was
83 dropped in on the 27th. No. 2407 was dropped in on the 28th.

On redirect examination the witness further testified:

The Cable Lumber Company had some interest in logs that were marked S. A. M. It was a half interest. I know there had been a division of the logs made up at West Newton. The fact is they had been divided up as fast as they came out of the rafting works—that is, we would give Lindsay & Phelps Company two brails, and the Cable Lumber Company alternately during the season. They had been charged to Lindsay & Phelps Company and had been consigned to Lindsay & Phelps Company and placed in their own chances under this arrangement I have testified to.

I marked all the brails at the time they were seized in the same manner, making a mark following the letter A. I made no particular notes except with regard to these three brails that were liable to go aground.

These other brails were seized at the same time the three were seized that I made a note of.

The plaintiff, to further sustain the issues upon its part, called HUGH STEWART, who testified as follows:

That he was thirty years of age; that he had been employed at West Newton by the Mississippi River Logging Company since 1883, more or less, in the office; that the various tally-sheets which had been referred to by the other witnesses had been in his possession, and that he furnished them to counsel before the depositions of the witnesses were taken, and that he made a computation of the amount
84 in feet, and the number of logs as shown by those tally-sheets, each of them, and that the number of logs and the number of feet that are shown by the tally-sheets as they appear there, were:

Brail No. 2228, 1,007 logs, 132,120 feet; brail No. 2272, 1,071 logs, 133,650 feet; brail No. 2222, 1,064 logs, 134,160 feet; brail No. 2304, 1,046 logs, 138,230 feet; brail No. 2387, 1,020 logs, 141,380 feet; brail No. 2407, 1,004 logs, 143,270 feet; brail No. 2470, 990 logs, 144,270 feet; brail No. 1030, 596 logs, 70,650 feet; brail No. 1637, 658 logs, 68,220 feet.

Plaintiff, further to sustain the issues upon its part, offered in evidence the tally-sheets of brails Nos. 2228, 2272, 2222, 2304, 2387, 2407, 2470, 1030, and 1637.

A copy of the tally-sheet of brail No. 1030 is hereto attached and marked Exhibit A 2. All the other tally-sheets were similar in form

and differed only in the marks of the logs, numbers of logs and feet, and the names of the parties signed thereto, each of said tally-sheets being signed with the names testified to by the several witnesses, as above set forth.

The witness STEWART further testified:

I was employed in the office of the West Newton Boom Company in the summer of 1893. I had been employed in that office since the summer of 1883. I had charge of the log business and log books. I made the consignments and bills for brails and rafts. I mean by consignments a record of brails and brail numbers and the number of logs in each brail. When a consignment is made out I mail it to the different owners. In order for me to perform these duties it was necessary to become familiar with the
85 ownership of the different marks of logs.

I knew then and I know now who the owners were of all the heavy running marks of logs that were running through that boom and being rafted out in 1893.

I have seen the tally-sheets that were attached to the depositions in this case, and know the principal marks that are in those tally-sheets. Some of the marks in these tally-sheets had been in use before that year. I cannot say they were all used before. No one else who had logs coming through there other than the parties whom I treated as the owners of these logs ever made any claim to any of the logs of those marks.

Lindsay & Phelps Company was treated as the owners of these various marks of logs that are in these tally-sheets during the year 1893 and of the same marks that had been running prior to that time. The logs bearing those marks were delivered during that season after they had been sorted out and rafted to the Lindsay & Phelps Company.

On cross-examination the witness testified:

I made out the scale bills when those logs were delivered to Lindsay & Phelps Company. That is all I had to do with it. That is what I mean by delivery, and is all I know about any delivery. These scale bills were made out by me in the office of the company.

When I speak of the West Newton boom I mean the rafting works at West Newton. These were logs that were running into the slough of the Mississippi river on the Minnesota side, known as West Newton slough. The logs are run from there by steamboats, which did the towing on the river, and they towed them to points down the river from the rafting works.

On redirect examination the witness testified:

86 When logs were delivered the boat that took them gave a receipt for them. These receipts were turned in to me for me to turn in the numbers. I entered in the consignment book the figures he turned in to me. I know the different boats that were employed by the different parties. I know the boats that were owned or employed by the Lindsay and Phelps Company to tow their logs.

I didn't always see their receipts for brails that contained these marks of logs signed by these boats. I generally did.

On recross-examination the witness further testified:

I only know the owners of the various boats on the river from what somebody told me. None of the officers of the Lindsay & Phelps Company ever told me what boats they owned. I couldn't tell you who it was that told me what boats Lindsay & Phelps Company owned. I understood they owned some boats. At times they hired other people to do their towing.

I spent all my time in the office. Mr. Chapman, the agent of the Lindsay & Phelps Company, told me what boats they employed for towing. All I know is what he told me.

Thereupon the plaintiff rested its case, and the defendant- moved for judgment on the ground that there was no proof of ownership of the brails which the plaintiff replevined; which motion was denied by the court.

Whereupon the defendants admitted in open court that no request was ever made by the plaintiff or any one else that the surveyor general should scale any of the logs running through the boom at West Newton in the year 1893.

The defendant-, to sustain the issues upon *its* part, offered
87 in evidence the articles of incorporation of the Minnesota Boom Company, which were marked Exhibit No. 1 and a copy of which is hereto attached, marked Exhibit No. 1.

Whereupon the plaintiff objected to the reception of said paper on the ground that the same is immaterial.

But the court overruled the objection and received the paper in evidence; to which order and ruling the plaintiff then and there duly excepted.

Defendant- then offered in evidence the commission of the defendant John H. Mullen, as surveyor general of the fourth lumber district, in the State of Minnesota, dated April 12th, 1893, which was marked Defendants' Exhibit No. 2, a copy of which is hereto attached and marked Exhibit 2.

Whereupon the plaintiff objected to the reception of such paper in evidence on the ground that the same was immaterial and incompetent; but the court overruled the objection and received the paper in evidence; to which order and ruling the plaintiff then and there duly excepted.

The plaintiff then objected to any further evidence under the answer in this case upon the ground that said answer does not state any facts which constitute any defense to this action, and on the ground that the same is immaterial, irrelevant, and incompetent; but the court overruled the objection and permitted the defendant- to introduce further testimony; to which order and ruling the plaintiff then and there duly excepted.

The defendant- then offered in evidence a certified copy of the official oath and bond of the defendant John H. Mullen, dated April 17th, 1893, and recorded the same day.

The plaintiff objected to the reception of such paper in
88 evidence upon the ground that the same was immaterial and irrelevant; but the court overruled the objection and accepted the paper in evidence; to which order and ruling the plaintiff duly excepted.

The defendants then, to further sustain the issues upon their part, called JOHN H. MULLEN, one of the defendants, who testified as follows:

I am the same John H. Mullen who was appointed surveyor general of the fourth district of logs and lumber in this State by Knute Nelson in April, 1893. I then resided and still reside at Wabasha, in this State. I know where the booms of the Minnesota Boom Company were located in Wabasha county at that time. They were located right at what is known as the West Newton slough, a point six or eight miles below Wabasha, on the Mississippi river. West Newton slough is a branch or side stream of the river, perhaps two and a half or three miles in length and in the neighborhood of a quarter of a mile in width. The main river flowed on the east side of this slough. The slough bordered the Minnesota shore. There was very little land in width between the east side of the slough and the main river—more a bar than anything else.

There were one or two small islands lying in there, and at the upper end, the north end, there was an island. I don't know the width of it; some considerable width at the upper end and at the lower, where the pockets were located. It was more of a bar than anything else. The main channel came up very closely to the works, where the works were actually in operation. The upper end was used principally for the storage of logs, and then further down they came to the point where they were assorted and turned into the
different pockets. As they ran down through the pockets
89 they were brailed and sealed and fitted for running out of the pockets further down. That part of the boom was very close to the main channel. The boats came right up to it. It was navigable up to the lower end of it, and it ran out, striking the main channel below, so that it was navigable all about there for steamboats.

At the upper end of the slough or at the upper end of the West Newton slough the boom company had arranged what they called a shear boom, that stretched out across the main channel of the Mississippi river, and that boom sheared or turned everything that came down the river and everything that was floatable into this West Newton slough, everything except steamboats, and that boom was opened and closed to permit steamboats to pass through—similar to a drawbridge.

Every time a steamboat went up or down the river it was turned one side to let them pass, and then resumed its position again after that obstruction had passed. It was put there for that purpose; for the very purpose of turning all the logs and everything into West Newton slough. As a matter of fact, all the logs were turned in there. All the logs that came into the river went into the slough,

and steamers would have to go in if they had not opened it to let them pass through. The rest of the slough was used for storing and holding logs in mass as they came down the river intermingled.

That is the upper end, and then after getting down beyond the storage part they came to what is called the sorting works. Then the logs were permitted to run along down still further. They were sorted according to their marks and turned into the various pockets or channels made of timber or boom sticks. There were several of these pockets running parallel with the length of the slough.

90 They simply divide the lower end of the slough into six or eight or ten different channels; just the number there were pockets there. These pockets were guarded on each side by continuous timbers or boom sticks, as they are called; hewn timbers generally, where the man could walk along the sides of them; timbers perhaps 24, 30, or 36 inches in width, joined together, so that the man walked on each side. They were used for the purpose of holding the logs in place that were turned in between them. They were fastened with piles, piling, and groups of piling and fastened with chains and anchors and lines, and then bridges were across at places, where the logs ran under them and the men walked over to get across. They were all connected with the Minnesota shore; they were in the main, at least.

These pockets were a part of the boom system. The logs went down by the force of the current as they were released from above whenever the people in control of the boom see fit to let them down to brail them and assort them.

The method of assorting in a general way was this:

There were a number of men employed there called assorters; they were familiar with the different marks: perhaps 2,000 or 3,000 different marks. These men pointed or pushed the logs in one direction and then there were other men who followed along down, persuaded these logs into these different channels or pockets, guided them in there, and sent them down into these pockets. I can hardly give an intelligent description of it. They were assorted in accordance with the marks. Logs of a certain mark were put in one pocket and perhaps several marks into another pocket and they were divided in this way.

These storage grounds above held everything, and then

91 these pockets would branch off from them, so a division of the property could be made very easily and very readily by those who were competent to do so. Men who knew these marks divided them accordingly and separated them.

I have known of an instance where marks of logs other than those intended for a particular pocket went into another pocket, of my own knowledge. The ownership of the logs which were passed through these booms was distinguished by the marks entirely. I have no knowledge of the exact number of marks. I am speaking perhaps more from common report. My best knowledge is that there were about 3,000.

These marks were cut into the logs. What they call a bark mark is cut into the logs through the bark and into the body of the logs,

with an axe, I presume. They have then what they call a stamp mark—in some instances, at least. That is put on the end with a sort of stamp, which perhaps is driven into the end of the log. Sometimes there are two marks on a log, one of which we call a bark mark and the other a stamp—that is, on the end, the sawed end, of the log—and these marks are letters and numbers and characters of a great many different kinds.

After these logs were assorted out in the various pockets they began at the lower end of one of the pockets usually, and the logs were put into what they call or what are known as brails, lengthwise, and generally the width of the pocket, and were bound together with wire, ropes, and chains and boom logs, with the brails arranged perhaps, my recollection is, about 600 feet in length and about the width or substantially the width of the pocket, perhaps 25 or 30 feet; I am not sure about that. This brailing is done for
92 convenience in handling the logs. These brails are then dropped down out of the pockets and then coupled up, and several of them together make a raft. Two or more brails form a raft. After they get out of the boom they are joined.

During the season of 1893 the logs passed out of these booms more rapidly at times than at others. During the month of June they ran at times six or seven or eight millions per day. I think as high as nine millions go out. The entire season while I was at work there the logs passed through at a very rapid rate. It depended largely upon the condition of the water and, of course, the quantity of logs on hand to draw from. The logging season that year ran along about ninety days. Over 400,000,000 were put through in that length of time, I think.

After the logs are brailed up and put into rafts in the way I have indicated they are subsequently taken down the river in rafts.

I have no personal knowledge that these rafts are oftentimes sold in bulk.

After the logs are put into these brails and brailed up every individual log is fastened in the raft, but they were fastened within certain booms and intended to be kept in place. They were packed tightly together—drawn together by outside boom logs running the entire length and inside and across. The boom logs were connected one with the other by chains and pins, so as to make a continuous fastening of logs around the entire brail, and then they were fastened in crossways with wire, ropes, and coupling lines. These rafts are from time to time towed down the river by steam-
93 boats. That is the usual manner of getting them down, I think. Generally, I think the price for towing is fixed by the quantity of the logs in the raft.

As these logs come down they are caught by this shear boom, which extends out into the river. They are in the process of floating down the Mississippi river from points above.

My best recollection is that this West Newton slough has been used for boom purposes since 1887—that is, within my own knowledge since that time.

It is not possible for the surveyor general of that district personally to do all of the work of scaling and surveying these logs, as provided by statute. It would take from thirty to fifty men when the logs were running, in the usual course of business, rapidly, and perhaps above that. It became necessary for me, in order to do that work, to appoint a large force of deputies, and I did so appoint. There was no town or village at West Newton in 1893. The next town or village is Minneiska, on the Minnesota side, about six miles below, and Alma, on the Wisconsin side, perhaps about the same distance above or a little less. I have no personal knowledge what were the hours of operating the boom during the season. In a general way, it was continuously run long hours during the busy season; from morning until night and without any nonesense.

My deputies during the season averaged something over thirty; from twenty-eight, perhaps, to thirty-five or thirty-six scalers; and then one tallyman to each two scalers. That made up the scaling crew. In addition to that, the general deputy who had charge of the work overlooked it.

The men were fed and lodged there right adjoining the work, in buildings built by myself for that purpose, and taken care of during the entire time.

94 Q. You may state whether or not there was any opposition on the part of the boom company to their scaling logs that season.

Counsel for the plaintiff then disclaimed any claim that the defendant is not entitled to his fees for scaling whatever logs he did scale by reason of the fact that before he commenced to scale some logs had run through the boom; and admitted that the parties in charge of the booms objected to his scaling the entire mass of logs in the boom at all times, not only while they succeeded in preventing it, but afterwards. Thereupon counsel for the plaintiff objected to the question as immaterial and incompetent.

The objection was overruled, and the witness stated that the boom company opposed his scaling logs there that season; that at first the boom company refused to permit the surveyor general's men to land with a barge-load of lumber and supplies for building camps, and used some force in preventing such landing; that he, the witness, afterwards went back with a crew of men and a steamboat and a barge-load of lumber and supplies and served a restraining order upon one Scott, who was there in charge of matters at the works, and then the witness landed. There was some talk between him and Mr. Douglas, but after communing over the matter for a time he was permitted to land; after that, repeatedly, brails of logs were let out of the different pockets and set down the stream before the surveyor general's men had finished scaling them, carrying them down the stream four or five miles, so they would have to row back against the current, and lost perhaps half a day. There was no particular number of scalers assigned by me to each pocket. The scalers went wherever they were ordered by Mr. Daly, who had charge of my work; sometimes there would be very much more

work in one pocket than in another. Mr. Scott was the manager of things for the Minnesota Boom Company in the season of 1893 in the office. Mr. Douglas, I think, had charge of the actual work of brailing and handling. Mr. George Scott was the general manager at the boom that season. I had known him in the neighborhood of fifteen years. We scaled everything that ran out of the boom within forty-eight hours after we landed the barge-load of lumber and made shelter for the men. The first day or two we were there we didn't scale everything; we ran until the close of the season from about the 15th of May. I would not be positive about the time of beginning. I had possession of the logs in question in these cases at the time of the commencement of this action.

Q. Under what claim did you so take possession?

The plaintiff objected to the question as immaterial and incompetent; but the court overruled the objection and permitted the witness to answer the question; to which order and ruling the plaintiff then and there duly excepted.

A. Under the claim of a lien for scaling or surveying.

Q. Were you holding the logs under the lien for scaling or surveying?

95 The plaintiff objected to the question as immaterial and incompetent; but the court overruled the objection and permitted the witness to answer the question; to which order and ruling the plaintiff then and there duly excepted.

A. I was.

That is all the claim I had.

I had a man in my employ during that season by the name of Johnson. He was in the office with me. I don't believe I can say what his first name was. He is present in court. I am not sure of his name—that is, his initials.

I caused to be served on the boom company scale bills for the work done by me there that season. I did not serve them personally myself.

A bundle of papers was then marked Defendants' Exhibit 3.

Q. I show you these papers which have been marked Defendants' Exhibit 3, and ask you if those were the scale bills for the work done there in May and June, 1893, together with your notice of lien claimed.

The plaintiff objected to the form of the question, unless it expressly appears by the record that the question is asked simply for the purpose of identifying these papers.

Counsel for the defendant stated: That is the purpose, just to identify them.

If it is for that purpose, I do not object to it.

A. Those are the bills.

These were also the notices of liens claimed, which were served for these scaling bills.

The defendant then offered in evidence Exhibit 3.

Permission being granted by the court, the witness was
96 examined by counsel for the plaintiff in reference to these papers, and testified as follows:

I don't know whether these papers were all served at the same time; I can't answer that question. I stated in my answer that they are the papers that I had prepared and caused to be served. I did not serve them personally. I was within a skiff within fifteen feet of the door of the office when Mr. William Foreman went in with them. He came out without them. He had general charge of my work; he is one of my deputies and is here in court. The bill of May was not served at the same time as the bill of June.

Q. These two scale bills appear to be one for May and one for June. Were they all taken by Mr. Foreman when you were in the skiff as you speak of and served at the same time?

A. At two different times. The bill for May was served shortly after the end of May and the bill for June was served soon after the end of June; as soon as it could be made up in the course of the office work. Mr. Foreman can give the date.

My best recollection is that these other papers to which the two notices are attached were served after the other papers; they were served subsequently. I don't know that of my personal knowledge.

My recollection is that the numbers of these brails seized were seized and numbered and notice served immediately upon our way up from the place where they were seized. It says so. It says I have seized and taken actual possession. A description of the logs seized was served at the time of the seizure and at the time of the service of the bill.

These papers, marked Defendants' Exhibits 5 and 6, were not served at the same time as either one of the others.

97 Counsel for the plaintiff said: Exhibit 3 is the scale bill for June, having attached to it the notice that the defendant claims a lien on the logs and the bill for scaling.

Exhibit 4 is a similar document for May, with a notice of lien attached to that bill.

Exhibit 5 is a notice that the defendant has seized and taken into his possession fourteen brails of logs, which are numbered and are the brails in dispute in these three cases.

Exhibit 6 is a paper exactly like it, except that one of these papers says that he does it to enforce payment of certain fees that have accrued to him during the month of June for the amount of $9,153.10, and Exhibit 6 says it is for the month of May to the amount of $1,935.82.

The witness further said:

I think I was present or near by when Exhibits 5 and 6 were served. I am quite sure of it, but I did not serve any of these papers personally, and I don't know to whom they were given except as I have been told.

The plaintiff then objected to the introduction of these papers and

each of them, stating that as far as Exhibits 5 and 6 are concerned neither one of them is a paper which under any circumstances is authorized by law. They do not appear to be addressed to the plaintiffs in this case or to have ever been delivered to it, and they are entirely immaterial and incompetent in this case.

As far as Exhibits 3 and 4 are concerned, we make the same preliminary objection—that there is as yet no proof of service upon anybody. We also object for the further reason that these papers are not yet made competent in this case for any purpose.

The statute under which they claim requires the surveyor
98 general to make out these scale bills (which, as far as the month of June is concerned, complies substantially with the law), and then it requires him to immediately record such bill on the books of his office, and upon his being paid his fees for such services to deliver a bill to the owner or manager of the boom. I suppose it is claimed that this original bill was delivered to the owner or manager or agent of the boom company, but I am assuming, for the sake of the argument, that somebody who was the manager of the boom company got these scale bills. Now, it would appear from the status of things that this bill was delivered before the surveyor general got his fees, and he had no business to deliver it. It does not appear that these bills were recorded in his office before they were delivered, and therefore the defendant had no business to deliver them.

There are in these bills and each of them a large number of logs running through this boom. The law provides: "No logs shall be scaled by the surveyor general or his deputies unless the marks upon said logs are properly recorded in accordance with the provisions of this title."

There is no proof that any of these log marks were recorded in the office of the surveyor general, and for these reasons we object to these papers being received in evidence as immaterial, incompetent, and irrelevant.

The court addressed counsel for the defendant-:

Do you claim there has been proof of service?

COUNSEL FOR THE DEFENDANT-: There has been some proof of service, and that is merely preliminary proof of service, and full proof of service will be shown later.

The court then overruled the plaintiff's objections and received the papers, Defendants' Exhibits 3 and 4, in evidence; to
99 which ruling and order the plaintiff then and there duly excepted.

Defendants' Exhibit 4 purported to be a scale bill of logs scaled during the month of May, 1893, containing 70 sheets. A copy of the first sheet and of the last sheet and of the notice and bill attached thereto is hereto attached and marked Exhibit 4.

Defendants' Exhibit 3 was a similar scale bill for the month of June, 1893, containing 78 sheets. Copies of the first, 25th, 27th, 30th, 33rd, 36th, 40th, 43rd, 48th, 51st, 52nd, 60th, 68th, and last sheets of the scale bill proper and of the notice and bill attached thereto are hereto attached and marked Exhibit 3.

The remaining sheets of Exhibits 3 and 4, not copied, were in all respects similar in form and contents to the sheets copied; are different only in the marks of logs, the number of feet purporting to be contained in such marks, and the date of the alleged scaling.

Upon cross-examination the witness testified:

I reside at Wabash. My business is practicing law. I have been engaged in the practice of law steadily for about fifteen years. My business has not been exclusively that. I have been engaged in the public service. I was adjutant general of the State for four years. Aside from that I had no other business. In the main, except in the performance of my duties of that office, I have attended entirely to the practice of my profession until I was appointed surveyor general. I had no practical experience whatever in scaling logs and lumber up to the time of my appointment as surveyor general. I did not scale personally any of these logs mentioned in these two bills.

The boom that I have described in response to the questions put to me by counsel as the boom of the Minnesota Boom Company runs from the upper end of the island on the east side of the slough over to the shore on the other side or very near to that shore; at least so that no steamboat or other water craft, unless it were a skiff, could go up or down the river unless the boom was open. That is my understanding. My idea is that that kind of a structure was necessary to get the logs into the West Newton slough. This shear boom is not a line of piling; it is two or more timbers, square timbers, joined or bolted together so as to make one continuous line of timbers reaching from the shore or near the shore on one side clear across the channel, sufficient to turn everything that is floating down in. It is several hundred feet long, fastened or attached to piles, I think. I don't believe I can tell the exact manner in which it is fastened at the shore end. Of course, the upper end, the swinging end, that moves independently, and it is opened or closed with some sort of a jenny or windlass. A man is kept there for that purpose, I believe. I should say it is not the lower end instead of the upper end that swings. I have been there on steamboats several times; boat whistles for the boom to open, and they pass through it. I did not see it when it was in the processs of construction. I don't know who built it except as I have been told. That is equally true of everything else that I have testified to about the West Newton slough. I don't know who built it or anything about it, except as I have been told or as I have inferred.

After you get by the head of the island the eastern side of the slough is either the island or a sort of continuation of it, in the shape of a bar, down as far as the works go. I know there are booms all the way along the shore. I have been there on both sides; there is a boom a good deal of the way. The booms are all the way along there to keep the logs from running into the stream in high water; of course, not on the Minnesota side, where the bank is high enough to hold them, but there is a network of booms all the way along there. When you go down

toward the lower end of the slough, towards what I call the assorting works, I don't know how many booms there are extending from each side towards the centre of the slough. I don't know as to the number. I know there is a place where they sort the logs, what they call the assorting works. As the logs come down from the storage pockets above they are separated and segregated. There is such a place there; I don't know how many there are. I don't know just how the assorting is managed; I have seen a part of it. I have seen it in a general sort of way—men working punching logs one way or another and calling out the marks—but just what the method is along there I don't know. My knowledge of it is general and not at all specific. I never had anything to do with them, either personally or through my men, at all. I did no sorting and we did no sorting; the boom company did all the sorting, and we simply scaled what was put in the pockets while they were being brailed, and nothing else. I know that all these logs were fastened to the Minnesota shore. There is no line of piling to my knowledge on the east side of the channel of the river; it is all on the Minnesota shore. The anchorage that holds the assorting works and these rafting pockets is a line of piles extending up and through the centre of the slough, but it is also connected with the shore. The whole business is on the Minnesota shore.

When I say these things are all fastened to the Minnesota shore I mean that the slough is on the Minnesota side of the channel, and these works are all fastened in the slough; but the buildings and all the business is done from the shore of the Minnesota side; there is nothing done on the Wisconsin side at all. None of my men, as far as I know or have any information, ever scaled any of these logs until they had been assorted and run into these various pockets, and when they were assorted and put into the pockets the logs were straightened out and put lengthways up and down the river, and if any of them ran in crosswise they straightened them out, and they lay them substantially clear across in that manner.

102 These boom logs that I spoke of that confine the logs are in the pockets when the logs commence to run in. They were placed in there first, so that the boom extends clear around the pocket except at the upper end, and is opened at the upper end to let the logs run through it, and when they get the pocket filled, then a boom is put across the top. It is closed, and then the brail is ready and dropped out. When the logs are straightened out in these pockets and the boom rafted, as I say they are, they are not immediately fastened together with these cross-lines—that is, not until the brails are pretty near finished. It is during that time, after they have been straightened out, but before they are fastened together with cross-lines, that we did the scaling. The scaling was done at the time the brails were being made up. The scalers followed the rafting crew right along. That was the usual course of business at that time adopted, so as not to interfere in any way with the business of booming. It is not as practical to do the scaling after the cross-lines were put on and the logs dropped out, because they could not be turned so well

if they were close together. It would be more difficult to do it. They would have to be pried apart in order to roll them if they were tied together.

I never towed any logs from there. I never made any contract for towing them. In the main, all I know about it—how the price of towing is fixed—is what somebody has told me. I have seen bills and statements between the company and men who were engaged in towing and looked over and checked them up previously; perhaps eight or ten years ago.

It is a fact that in some instances the towing from West Newton was done by the raft; by the thousand in others. I don't know personally of any instances in 1893 when it was done by the thousand.

A man by the name of George Scott was general manager of the works there. I don't know whether he was an officer of the Minnesota Boom Company. Mr. Edward Douglas was foreman in charge of the crews on the works, so reported. He seemed to have
103 charge of the men. I don't know whether he was an officer of the Minnesota Boom Company. According to these scale bills, we seem to have commenced scaling logs there May 15th. That was the first scaling I did there.

Q. Did you have in your office at that time any record of log marks?

The defendant- objected to this question as incompetent and not proper cross-examination.

COUNSEL FOR PLAINTIFF: We propose to show that there was no record of log marks.

COUNSEL FOR DEFENDANT-: It seems to me that that is a part of their case-in-chief, and not proper cross-examination.

The COURT: My impression is it is immaterial anyway, whether there was or not.

The court thereupon sustained the objection; to which order and ruling plaintiff then and there duly excepted.

COUNSEL FOR THE PLAINTIFF: I understand the objection to be sustained on the ground that the testimony is immaterial, and not because it is not proper cross-examination.

The COURT: On the ground that it is immaterial.

The plaintiff then offered to show by this witness that neither on the 15th day of May, 1893, nor any time thereafter during the period covered by Exhibits 3 and 4 was there any mark of logs or log marks recorded in the office of this witness, in accordance with the provisions of the statute of Minnesota in relation to the recording of log marks.

The defendant- objected to such testimony as immaterial, incompetent, and irrelevant, and not proper cross-examination.

The court sustained the objection; to which order and ruling the plaintiff then and there duly excepted.

A. I was not there at the boom all the time after the 15th of May. My knowledge of that comes to me from reports made to me by my deputies; and except what I saw of the working while I was there, that is all I know about it.

I know in a general way where the south line of Wabasha county is. I have been taken to the point where the county line is. It is just down below Minneiska, but I don't know that there is anything by which I could describe it now. It has been pointed out to me. It is below Minneiska; not a great way below, but I should think from a quarter to three-quarters of a mile; not a great ways below Minneiska.

104 Upon redirect examination, the witness testified:

The upper part of the works, the bank, is used in place of a boom, along in the first part of the season. By the storage the bank is very high, fifteen or twenty feet above the level of the water, even in high water—that is, on the main land.

The defendant-, to further sustain the issues on their part, called WILLIAM FOREMAN, who testified that he resides in the town of Glasgow, Wabasha county, and has resided there for forty-two years; that he has been familiar with the location of the West Newton slough since the winter of 1856, and that he was familiar with its conditions and the use to which it was devoted in the year 1893.

The witness then described the slough and the booms therein, substantially as they were described by the witness Mullen.

He further sais in describing West Newton slough and its location: The logs were gathered in the storage boom by running in from the Mississippi river above the shear boom. The shear boom was running from the Wisconsin shore towards the head of this island; the island which is between West Newton slough and the Mississippi river. There were two islands. The upper island in its widest part was, I should judge, in low water, about thirty or forty rods wide in the widest part. The lower island was some wider than the upper one; I could not tell you exactly how wide it was. The main channel of the Mississippi river, with reference to these islands, was over towards the Wisconsin shore. I do not know how wide the main channel was; I could not tell. I could tell very near how wide the river was; I should judge it was between half and three-quarters of a mile between the island and the Wisconsin shore. I think it was a little wider opposite the lower island, and it was in the main river that the boats navigated during the season. There was a couple of Government dams ran from this island out into the river to make the water run into the channcel at the lower island where the river, I think, was the widest, to gather the water; these were wing dams; they did not extend clear across the river; they were on the island.

A map was produced and marked Defendants' Exhibit 7, a copy of which is hereto attached and marked Exhibit 7, which was conceded to be substantially accurate. The said map was then offered in evidence by the defendant-, and the plaintiff objected thereto upon the same grounds as its general objections to all of the evidence offered at the opening of the defendants' case; but the court overruled the objection; to which order and ruling plaintiff then and there duly excepted.

The witness further testified:

I have marked on that map, with lead pencil, one of the pockets, putting the name "pocket" to it.

That pocket marked "A" is the foot or lower end of the storage boom. This point just below "A" is really a part of the log channel. This boom up here runs over to the Minnesota shore. This part marked "channel race" is what I mean by the log channel. The
105 portion of the boom between the letters B and C on the map represents the first sorting place, where there are a large number of sorting gaps for the pockets adjacent thereto. The place between D and E represents the second sorting place on the way down the log channel, there being a large number of sorting gaps in that territory. The third sorting place is between the letters on the map F and G, there being quite a number of sorting gaps there, and there is another sorting place between H and I, but there is not much sorting done there. To each of these sorting gaps, as I have pointed out on the map, there are these pockets tributary.

The Minnesota shore is on the southwest side of these booms and the island on the northeast. The main channel of the Mississippi river is not shown here until you get down below the slough, out northwest of the island.

This sorting of logs as they came down from the storage boom was conducted as follows: There was a party of men put on the logs before they came into the gap at all, marking them with an axe. Then they were run down into the gap and a crew of men pulled them or run them into the pockets. They pulled them in with long pike poles. The logs were floating in the water and were rolled over from time to time to get at the various marks. Certain marks were run into certain pockets, as far as the men could do it. I saw them working it.

That process went on at these various sorting gaps all through the full length of the boom. As to whether or not the logs were sorted clean into these various pockets depended to a considerable extent upon the ability of the men to do it, I suppose. I am not enough acquainted with the marks to know.

The brailing process was as follows: As soon as they com-
106 menced in a pocket they would run the logs into it, or if the pocket was full they would commence to straighten them around. A crew of men on each side or two men would make a boom out of three links and two plugs, and a plug at the end of each log, and kept right on until the brail was finished, in this way making a boom for the outside of the brail; and at various distances they would run a wire line across, with a crotch driven in the log over it, and other logs would fill the brail. They were arranged in tiers across, and the brail when completed was held crossways by wire ropes to make it a little more stiffened, so it wouldn't spread out, to hold the brail tight together so it would be about the same width all the way up.

The surveyor general did that work upon the logs as they were being brailed up into these brails in the pockets. The logs then

were in condition so as to be rolled over readily in the water and the mark examined.

I first went down there to the boom to assist General Mullen in his work on the 2nd day of May, and I was with him as his deputy during the entire season from that on.

Q. You may state whether or not there were any obstructions put in your way by the boom company to the work that the surveyor general was doing or attempting to do there.

The plaintiff objected to said question as immaterial and incompetent; but the court overruled the objection; to which order and ruling plaintiff then and there duly excepted.

A. Yes, sir; there was.

Q. You may state what.

The plaintiff objected to said question as immaterial and incompetent; but the court overruled the objection; to which order and ruling plaintiff then and there duly excepted.

107 A. By their men getting on and being in the way when we started. We would have to wait until they got five courses ahead, and then if our men weren't through they would run them out and run them off down the river.

The plaintiff moved to strike out the answer of the witness as not responsive to the question and as immaterial and irrelevant; but the court denied the motion; to which ruling and order the plaintiff duly excepted.

That was not the first obstruction. The first obstruction was when I undertook to land my barge and they cut my lines loose—the barge with supplies to build the camp and lumber. Mr. Douglas ordered the lines cut.

Q. Who else was there at the time of the company's men?

A. I don't know that. Mr. Scott showed up later and said that he gave——

Q. What do you mean when you say Mr. Scott showed up?

A. In a day or two afterwards when we were down there—Mr. Mullen and myself—Mr. Scott was on the bank. He and I had some words about what happened the day before, and he said he gave Mr. Douglas orders to cut that line.

The plaintiff objected to any testimony as to what Mr. Scott said until it is shown that Mr. Scott is such a representative as would bind the principal.

COUNSEL FOR THE DEFENDANT: Do you deny that he was?

COUNSEL FOR THE PLAINTIFF: I do.

The COURT: Isn't there some evidence that he had charge there?

COUNSEL FOR THE PLAINTIFF: There is some evidence that he had charge there—of the boom.

The court then overruled the objection; to which ruling and order plaintiff duly excepted.

108 Counsel for the plaintiff then objected to any testimony at this time as to what was said until some further evidence of Mr. Scott's connection with either the plaintiff or the Minnesota Boom Company is given; but the court overruled the objection; to which order and ruling the plaintiff duly excepted.

A. Mr. Scott was on the bank, and he and I had some talk about what happened a couple of days before that. I said I thought Mr. Douglas acted very roughly with me in cutting the barge loose. He said, "I gave him orders to cut the barge loose."

The WITNESS: The first obstruction was when we undertook to land the barge; a brail of logs was dropped down against the barge. I undertook to make fast to the pile out in the river. A brail of logs came out, and I told a man with a skiff to get on to the brail and pull; they did so and made fast to the piling in the river. Mr. Douglas ran up on the steamber Hartford and ordered them to let that line go and they did so. I didn't know anything about it, and called out to them to know what was the manner when I saw the line let go. They came in, and I told them to go and make fast to the shore and not let go unless I told them to. They started with another line or the other end of that line on shore, and made fast to a tree in the water. I was snubbing the end of the line on the barge when Mr. Douglas with his steamboat ran down between me and the shore and got the line fast on the bow of his boat. I threw the line loose on the barge and let it drop in the water, so that he ran over it. I turned to pull it in again and heard him call to some man in a skiff to cut the line, and the line was cut square off. I called the men in with the skiff again and told them to take the other line and go ashore—we were then getting near the shore—and Mr. Douglas with his steamboat ran round on the lower side of me and said, "Get out of here." I told him this was stuff to build camps for Gen. Mullen and I would like him to tow me to where I wanted to go. I told him I wanted to go up there, and he said he would tow me down the river. I told him I didn't want to
109 go down the river; I said I wanted to go up the river. He said, "Get out of here." I said, "I have got some stuff that I am going to land to make camps for Gen. Mullen." He said, "If you will put a board on shore I will throw it into the river." He said, "Come down to the office." I started to the hind end of the barge, and when I got very near the hind end of the barge he picked up the line and picked up a pole and pushed the barge out in the river. They let it go adrift, and we had nothing to make a landing with.

Q. What was the condition of the water?

Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

A. It was very high; running over the banks on both sides; a very swift current.

Q. What was next done?

Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

Mr. CLAPP: It seems to me that is immaterial; we do not deny that we used all reasonable means to prevent them landing, believing they were wrong and were attempting to land on our own private property. We shall not claim that this defendant did not do his duty as far as scaling the logs was concerned.

Q. What was then done?

Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

The WITNESS: We drifted down the river a little way when some one ordered a steamboat to go and hitch on to us and take us off the premises. The steamer John Paul came along and coupled on to the barge and started down the river with us. I asked who was the captain of the boat and Mr. McKenzie said he was the foreman. I asked him where he was going with me; he said he was going to take us to Minneiska. I told him I didn't want to go to Minneiska; I wanted him to take me to where I could unload and build a camp. He said he had to obey orders. They took us down and
110 landed us as far down as Minneiska and tied a line to the shore, and then went off and left us there. This was between five and six miles below the point where we were cut loose, I should judge. Well, the General then applied to the courts and got an injunction on them from stopping or further interfering with us. We got a steamboat and started in. We landed at the office and Gen. Mullen went in and served the injunction on Mr. Scott and had some talk with him and called me to be present, and Mr. Scott says, "If the General is going to have a witness, Hughy, come out, I want a witness, too." He said, "Come out, I want a witness, too." So Gen. Mullen read the papers to Mr. Scott and then proceeded on up river—up the slough, rather—with a steamboat and barge. We landed, and Mr. Douglas met us on the landing and said, "Capt., I forbid you to land here." Gen. Mullen then read the papers to him and he went off. We unloaded the barge and built the camps. There was not any more obstruction then until we got the camps built. Mr. Daly with his crew of men was going out to go to work, and Mr. Douglas came down to where the men were standing and got into a skiff and told the men they had better look out for their pay; that they were not wanted there at all, and the company would not be responsible for or pay one cent. Mr. Daly made some remarks to him that he was not afraid of his pay or the men were not afraid of their pay, and then they got into the skiff and that is the last I saw of them until they went off and were carried down the river.

I do not know whether or not the original injunction that was issued was afterwards modified to some slight extent. I remember something about keeping five courses apart. I do not know just exactly what it was. The next obstruction was when the men were carried down the stream. They were run out as fast as they could

run them out. I mean by the words "run out" that they were carried out on the brail before it was finished scaling. The surveyor general's men scaled the brails at the same time the men that were scaling for the company scaled them. There was no particular distance that the two crews of scalers kept apart, something like
111 five or six courses, sometimes a little more—that is, our men kept behind the others. They were always behind and the company's scalers would go through first, and then the brails would be run out with our men on them.

Q. What was Mr. Scott doing there at these booms?

A. O, sometimes he was up with the Gracie Douglas looking around. I never was on the boat with him while he was around there. Sometimes he walked up the bank. He ran the office. I heard him give orders to the steamboat men. I know he was in charge of the works.

The witness was shown Defendants' Exhibit 4 and testified:

I had that paper in my possession some time in the fore part of June, 1893. I gave it to Mr. George Scott, to whom I have referred. At the time I gave it to him the stamp mark, "Received June 16, 1893; answered," was not on it. I do not know who put it on. All I know about it is, I handed it to Mr. Scott and asked what he was going to do with it. He says, "I don't know." I says, "I want to know. Are you going to pay it?" He says he couldn't pay it and hold his job. I says, "What are you going to do with it?" He says, "I will refer it to my superiors." He took it and kept it.

The witness was then shown Defendants' Exhibit 3 and testified that he had seen that before and had had it in his possession
112 and served it on Mr. Scott on the 7th day of July, 1893, at half past four o'clock in the afternoon. He took it and kept it.

The witness was then shown Defendants' Exhibits 5 and 6 and testified that he had those papers before and served them on Mr. Scott at the same time that he served the June bill—that is, the 7th day of July.

The defendant- then offered in evidence Defendants' Exhibits 5 and 6; but plaintiff objected to the same, and each of them, as immaterial, incompetent, and irrelevant; but the court overruled the objection; to which order and ruling plaintiff duly excepted.

Copies of said Exhibits 5 and 6 are hereto attached and marked Exhibits 5 and 6.

The witness further testified:

Mr. Scott took and kept these papers also. I was present at the time of the seizure of these brails. The seizure was made just a little above Minneiska, at the mouth of the White Water river. When I seized the logs I got my men on to watch and hold them, and we held them until they were taken in the replevin action which we are now trying. These logs were not fitted up for rafts at the time they were seized. I was there personally nearly every day and saw the situation and condition of the logs at the time of the seizure.

Q. Do you know when the logs were seized—under what claim they were seized by General Mullen?

The plaintiff objected to this question as incompetent and not the best evidence and calling for a conclusion of the witness; but the court overruled the objection; to which ruling and order plaintiff duly excepted.

A. Yes, sir.
Q. You may state what.

The plaintiff objected to this question as incompetent and
113 not the best evidence and calling for a conclusion of the witness; but the court overruled the objection; to which ruling and order plaintiff duly excepted.

A. To enforce the payment of the May and June fees for scaling—that is, the scaling which was done there, as set forth in this bill.

I had known this Mr. Scott ten years prior to that time. These papers were all served on the same George Scott.

On cross-examination the witness testified:

I heard Mr. Scott give some orders there to some steamboat men. That was not with reference to taking rafts after the logs had been sorted. One was with reference to taking the boat up and leaving it at the camp, so that he could go to Wabasha. The other was to take a boat and take him down to Chimney Rock—take Mr. Scott down to Chimney Rock. He wanted to get the numbers of some brails of logs down there.

I heard him give Mr. Stewart some orders in the office. One of these boats was the Gracie Douglas, and the other was the Jessie Bell. I do not know who owned these boats.

My business had been farming up to the time I was appointed deputy surveyor. I had never lumbered any, and never had any experience in handling logs in any way, and didn't scale a log, and didn't undertake to direct the men how to scale logs.

It is along in there above the point marked C on the map that the men got on the logs and marked them with axes; between C and A, and so on, but they scatter out very wide. These marks are what they call catch marks. They don't agree with the mark that is originally put on the log. I understand that one catch-mark
will be cut on the logs of a great many different marks where
114 these same logs belong to the same owner. I understand that catch-mark is really so as to have a fresh mark to catch the eye of the men sorting. I suppose it was on account of these men that were not acquainted with the marks, so they would know about these catch-marks. They put them in whatever gap they wanted at the time they were sorting these logs.

I suppose one catch-mark might represent, perhaps, one hundred different bark marks and at other times only four or five.

At each of these places where logs are sorted and pulled in on one side or the other of what I call a log race men are stationed to examine every log as it gets in there, and if they find a mistake is

made by pushing it in there they push it back into the channel. There were four or five of these places.

The men who do the brailing or rafting are separate crews from the men who do the sorting.

I gave Exhibit 4 to Mr. Scott some time along in the fore part of June. I can't get any nearer to the date than some time in the fore part of June, because I didn't make any note of it. I wouldn't swear it wasn't on the 16th of June. I was so careful to make a note of the other one because we tied up these logs by a lien on those logs at that time.

We seized the logs between the first and seventh of July; I couldn't tell you positively what day it was; I didn't make a note of the day when we seized the logs. I think it was some days before the 7th of July. It might be three days; it might be only one day; I don't remember exactly.

When I gave Exhibit 4 to Mr. Scott I asked him if he was going to pay the fees. He said he couldn't. After he had said he couldn't I told him I wanted to know what he was going to do with it. He said he was going to refer it to his superiors. I asked him if he was going to pay it, and he said, "No."

115 He said, "I couldn't pay it and hold my job." At that I left the bill with him.

I didn't have anything to do with making out either of these Exhibits 3 or 4.

I know that those logs were not fitted up for the boats, because I had to go up to Wabasha to get the lines to hold them together; and another thing, I went down there the next morning after the seizure.

There was a crew of men at work fitting them up, and I stopped them. There was two steamboats tied up to the raft at the same time, ready to take them out, I suppose.

I never saw Mr. Scott at West Newton prior to 1893.

Defendants, to further sustain the issues upon their part, called THOMAS IRVINE, who testified:

I knew about this company known as the Minnesota Boom Company. I was the secretary of that company in the year 1893.

The defendants then recalled JOHN H. MULLEN, who further testified as follows:

I know Mr. Thomas Irvine, who was just now on the stand. I saw him in 1893 during the season, while I was engaged in scaling these logs down at this boom. I had a conversation with him as to who was in charge there.

Q. You may state what he said as to who was in charge of the Minnesota Boom Company.

The plaintiff objected to this question as immaterial and incompetent; but the court overruled the objection; to which ruling and order plaintiff duly excepted.

A. He said Mr. Scott was—George Scott.

That is the same man with regard to whom I have hereto-
116 fore testified.

On cross-examination the witness testified:

I am not sure whether the conversation with Mr. Irvine was at the capitol or at the residence of Mr. Irvine in St. Paul. It was during the month of April, 1893; possibly it might have been early part of May, but it was about the beginning of the work there. The conversation was on the part of Mr. Irvine; it referred to Mr. Scott. Mr. Irvine remarked as to the efficiency of Mr. Scott and his ability to turn out work and getting over work, and spoke of him in a very kindly manner—of Mr. Scott—at that time; and in the course of that conversation he stated, in a general way, that he always used to feel that he himself, Mr. Irvine, could do a good deal of work in a given time or length of time, but that Mr. Scott could oversize him, or words to that effect. He spoke in a complimentary and kindly manner of Mr. Scott and his ability as a man at the works. It was a general conversation. Mr. Irvine did the talking and I listened. Then, in a general way, he referred to his own health; that he was not strong. I think he mentioned some disability, that his general health was not good, and that he depended upon Mr. Scott to do his work there in the main; that is the substance. I don't know that I could give the exact language used by Mr. Irvine at the time, but the substance of what he said was that Mr. Scott was doing his work there and that he depended upon him doing Mr. Irvine's work. I think Mr. Irvine will recollect that conversation. I am not sure that the name of the Minnesota Boom Company was mentioned in that conversation at all.

Q. Does it not occur to you and is it not your best recollection that what you were talking about was the boom down there, and the work in the office, and Mr. Scott's ability to handle that kind of work, and his efficiency, and the character of that sort of thing?

A. Well, it came up in connection with Mr. Irvine.

I think he related to me the incident of his coming on here first and wanting to take this work from the East or from his former residence in Canada, if I mistake not, and then his living at the slough—that was at Beef slough—and then of his removal to
117 St. Paul, and getting away from there. It was the general conversation. I had known Mr. Irvine for many years. It was a sort of friendly conversation at that time. A part of his conversation was with reference to Mr. Irvine's coming there to the slough, and that led up to what was said concerning the work at the slough or at the booms down there, and also Mr. Scott. The more I think of it now, I am inclined to think that this was at Mr. Irvine's residence. I received a note from him asking me where he could meet me, and before I had an opportunity to see him I received another note from him asking me to meet him at his house. I went to his house and, I think, Mr. Scott was there. Mr. Scott went out a short time after I came there and the conversation then drifted in that direction. I may be mistaken as to the place; it was along at an early day. I had met Mr. Irvine several times on the train between St. Paul and Wabasha and several times at the

capitol, so it is very difficult for me to tell the exact time. When I said he detailed his going there from the East to take charge of that I referred to Mr. Irvine.

The defendant-, to further sustain the issues upon their part, recalled WILLIAM FOREMAN, who testified:

I know Thomas Irvine, who was on the stand lately. I have known him since 1885. I was present at the conversation which occurred between him and General Mullen in 1893 in regard to the management of the boom down at West Newton; I heard the conversation; it was in the Windsor Hotel bar-room in St. Paul. I would not be positive that the name of the Minnesota Boom Company was mentioned, but the name "boom company" was mentioned.

Q. Was anything said about Mr. Scott?

A. There was.

Q. What was said?

The plaintiff objected to the question as immaterial and incompetent; but the court overruled the objection; to which ruling and order plaintiff duly excepted.

A. Mr. Irvine stated that in his absence Mr. Scott had full control there.

On cross-examination the witness testified:

Q. When was this?

A. It was between the 2nd and the 15th.

Q. Tell us all you remember of that conversation.

A. Well, the start of it was General Mullen was getting out some papers to serve on the boom company, and Mr. Irvine requested a meeting at the Windsor hotel, and Gen. Mullen and myself went up to his residence and he was not in.

He made an appointment with me to meet me at the
118 Windsor hotel and we started on this cutting loose of the barge. Mr. Irvine said he was very sorry that it happened, and if he had been there it would not have been so. General Mullen said that the men down there must have had some instructions or they would not have acted so violently. Mr. Irvine said they did not, but that they took the matter in their own hands. He said then, Mr. Scott—General Mullen made some remark about Mr. Scott—I don't remember exactly what it was, but that they must have given orders or they wouldn't have acted as they did.

Mr. Irvine then said, "In my absence Mr. Scott has full charge of the business there."

There was some more talk about his appointment of surveyor general and how he had interceded for him. He didn't want him to scale the company logs. He had no objection to his scaling outside logs, but company logs he must not and would not allow to be scaled.

Q. By company logs you understood what were commonly called pool logs?

A. He said company logs he would not allow to be scaled.

I understood boom company, as we were talking about boom company. I understood him to mean the boom company because we were talking about it. He didn't mention the boom or mention the company. I inferred it to be boom company logs from what he said. I didn't know anything about it. I inferred that Mr. Irvine was talking about boom company's logs in the same way I inferred that Mr. Scott was having charge for the boom company, because I was talking about the boom company. He mentioned that Mr. Scott had full charge of the business.

119 The defendant- then recalled JOHN H. MULLEN, who further testified that he hears Mr. Foreman testify with regard to a conversation at the Windsor hotel with Mr. Irvine, and that he remembered that conversation substantially as Mr. Foreman related it.

The plaintiff then, at the request of the defendant-, admitted that there has been no payment to the State of Minnesota on account of the claim of John H. Mullen for scaling these logs, and that the plaintiff in this case has not paid the defendant Mullen on account of this matter.

The defendant- then offered in evidence Defendants' Exhibit 8.

The plaintiff, by its counsel, objected to receiving said paper in evidence on the ground that it does not appear to be an assignment of the claim of the defendant Mullen referred to in his answer, and also because the paper is immaterial, incompetent, and irrelevant. Counsel for plaintiff waived the production of the original paper.

Which objection was overruled, and to which ruling the plaintiff then and there duly excepted, and said paper was received and is as follows:

"For value received I hereby sell, assigns, transfer, set over and deliver to the State of Minnesota, any and all right and claim of whatsoever name, nature and description for services performed and disbursements made and expenses incurred by me as surveyor general of logs and lumber of the fourth district of the State of Minnesota, and I hereby authorize and fully empower said State to collect the same in any manner which may be deemed best.

In witness whereof I have hereunto set my hand and seal this 12th day of February, A. D. 1895.

JOHN H. MULLEN. [SEAL.]

Signed, sealed, and delivered in presence of—
C. G. LAWRENCE.
RICHMOND R. WARNER."

The defendant- then offered in evidence Defendants' Exhibits 9 and 10 and the same were received without objection, and a copy thereof is hereto attached and marked Exhibits 9 and 10.

The defendants, to further sustain the issues upon their part, called JAMES KANE, who testified as follows:

120 My name is James Kane. I have resided in Wabasha, on this State, twelve years. I know where the West Newton slough is; was there in 1893; had been there prior to 1893; was working just above the West Newton slough in the year 1891, on the shear boom that turns the logs down into the West Newton slough. There was half of that boom stationary and the other half was so that they could swing it to let steamboats and rafts go down the river. I saw that shear boom in the year 1893. It appeared to be just the same in 1893 that it was in 1891, that I worked there. In 1891 the boom was used to catch logs and shear them into this West Newton slough. Logs were supposed to go in there; but sometimes when the raft or a steamboat came along, if the logs were running thickly, there would be a good many of them go by when the boom was open, or, if it was closed, a steamboat going down empty, without a raft, would fetch the logs down there; otherwise it caught the logs as they came down and sheared them into the West Newton slough or boom. There was no certain time it opened, except a raft or a steamboat came along.

Thereupon the defendants rested their case.

Thereupon the plaintiff moved the court for judgment against the defendant upon the ground that, from all of the evidence in the case as it now stands, the defendant has failed to show any interest in or lien upon or right to possess the property described in the complaint in the action now on trial.

Plaintiff's counsel stated: I think that all the points we rely upon have been indicated to the court in the former argument; but I do not think there is any competent evidence to show that the defendant the surveyor general has scaled any logs down at West Newton; no scale bills, original tally-sheets, or pass books or anything of that kind have been introduced. It is true he has introduced a paper which he says he turned over to Mr. George Scott in the months of June and July, 1893, but these papers are not evidence under the statute, except that the surveyor general has made a claim against the Minnesota Boom Company for scaling certain logs.

121 They purport to be scale bills, but they are not sufficient evidence to prove the defendant's case. There is no evidence that these scale bills were ever recorded, and there is no evidence that the surveyor general ever recorded these scale bills in his office; also the evidence shows that the agent of the boom company refused to pay the bills; also, under the lien section of the statute, the surveyor general could not have any lien and could not take possession of any property until after he had made out and delivered these scale bills and notice of claim of lien. As far as the June scale bill is concerned, it appears conclusively that it was not made out or delivered to any one until three or four days after the logs had been seized.

But the court overruled the motion; to which order and ruling plaintiff duly excepts.

The plaintiffs then called EDWARD DOUGLAS, who testified as follows:

That he resides at Winona, and has for six years prior to that time resided in Wisconsin, at Beef slough; that he is forty-nine years of age.

I am in the employ of the Mississippi River Logging Company, and have been in the employ of that company since 1871 continuously. I know where West Newton slough is upon the Mississippi river. I have known of that slough since 1877 or 1878.

I first did work in that slough in the way of logging or rafting or navigating the slough about the eighties; early in the eighties, I guess; more from 1884 to 1887. Prior to that time we had piling put in there. When I say we, I mean the Mississippi River Logging Company. Prior to 1884—in the seventies—before there was any obstruction put in the slough, steamboats tied up to rafts in
122 there and towed down logs. I have heard a description in a general way of the booms and rafting works that are now maintained in the slough. The first sorting works were put in there in 1889, in the spring.

We had put a boom in in 1888, a storage boom, but the structures that were put there for the purpose of sorting works were put there in 1889. I had the entire charge of that work. I employed the men and provided the pay and procured the material that was used, piling and rock and timbers. I did the work for the Mississippi River Logging Company. I did not do that work or any part of it for the Minnesota Boom Company. I was never employed a day in any capacity for the Minnesota Boom Company.

In the work of sorting the logs we have a sorter at each gap before the logs go into the pockets, to ascertain whether they have been properly catch-marked. For that purpose we select a person who has knowledge of the different marks—one of the best men. If a log is not catch-marked there is another man, and if he sees any log without the right mark he puts it back in the main race and puts the proper mark on it. If a log escapes not only the catch-markers but the sorters and this man whose business it is, and it gets into the wrong pocket, there is another man who goes with the scalers, and it is his business to take it out and put it where it belongs, and that is done.

A very large proportion of these logs that come through here are owned by one company, the Chippewa Logging Company. The Mississippi River Logging Company is also an owner of logs that came through there.

We have a pocket at the upper sorting works for each owner, as far as we can, and if they can't be gotten into that pocket,
123 then they go down into a pocket at some of the lower sorting places.

The logs that came into the booms of the Mississippi River Logging Company there in the summer of 1893 came from the Chippewa river. About two-thirds of these logs belonged to the Mississippi River Logging Company and the Chippewa Logging Company. There were several hundred different marks belonging to the Chip-

pewa Logging Company. I speak of the Chippewa Logging Company as including the logs of the Mississippi River logging running in the summer of 1893. All of these marks and all of the logs of those several hundred marks were put into one pocket, or one set of pockets, as they came through. No attempt was made to sort those marks; they went in altogether.

Q. How much difference in respect to time and how much difference in the extent of the work and the time to do the work would it have made if all of these marks had had to be sorted separately as other marks were?

A. I shouldn't think you could do it at all. We would not have room enough; we would not have room to do it.

Q. Would the delay that would have been occasioned have
124 been such as to prevent getting anywhere near the full amount of logs through in any one season?

The defendant- objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Aside from the Chippewa Logging Company and the Mississippi River Logging Company, the highest number of marks belonging to any one owner which were running there in the summer of 1893 was probably twenty-five or thirty marks; some of them might have had more. There were not many owners that had as many as twenty-five or thirty marks. I should think not over ten or fifteen would be the average number of marks of the different owners.

I designated the different pockets into which the logs of all the owners should be delivered. I had that general oversight, and ascertained whether my instructions were carried out. I know they were. After the logs had been assorted and brailed my supervision ceased when the brails were fitted up for the steamboats. I had general oversight over the work until they were fitted up for the steamboats. Our men delivered the different rafts to the steamboats under my supervision.

The actual delivery of the logs to the steamboats representing the owners is done by men under my direction and supervision and I saw more or less of it done.

Q. Now, I will ask you this question: State, if you know, who, during all the time for the several days set opposite the two marks on Defendants' Exhibit 9, was treated and recognized by you and the men under you as the owner of these two marks and to whom the logs bearing these two marks were delivered.

The defendant- objected to the question as immaterial and
125 as calling for a conclusion of the witness.

The COURT: What would the testimony tend to show?

PLAINTIFF'S COUNSEL: The testimony tends to show that during all of these years these logs running through this boom were treated as belonging to the Lindsay & Phelps Company and to follow it up by showing that no one else has ever made any claim to them, and

then we shall offer to show that none of those logs with that mark ever got into that boom.

Mr. RICHARDSON: We object to it because it is not competent testimony to prove title, and, as far as ownership is concerned, the court has held that ownership has been proved.

The court then sustained the objection; to which order and ruling plaintiff duly excepted.

The witness then testified that in the winter he worked in the woods for the Mississippi River Logging Company, looking after the quality of the logs that were cut for the Mississippi River Logging Company and the Chippewa Logging Company, and that he visits the logging camps that are being conducted by other parties and sees the marks that are put on their logs.

Prior to 1893 I saw in the course of my travels on the Chippewa waters logs being put in there bearing some of the marks that are on Exhibit 9. The logs bearing the first two marks on that paper were being put in for Lindsay & Phelps Company. I don't remember having seen the third mark. The last mark was cut for the Chippewa Logging Company before 1893—five or six years before that—I don't know how many—several years before. It was after I saw these logs up there in the woods that I saw the marks coming through the boom.

Q. Has any one else other than the Lindsay & Phelps Co. ever made any claim there at the boom to any logs bearing either of the two first marks on this Exhibit 9?

126 The defendant objected to this question as immaterial and incompetent and no foundation laid. The court sustained the objection; to which order and ruling plaintiff duly excepted.

The witness further testified:

A good many winters I saw ninety to ninety-five per cent. of all the logs that are cut on the Chippewa river and its tributaries, and since then I have been employed as a sort of general supervisor.

During the winter of 1888 and 1889 and each succeeding season down to and including that of 1892 and 1893 I don't thin- I saw over fifty or sixty per cent. of all the logs that have been cut on the Chippewa river. During those winters my work was confined pretty much to the eastern tributaries. I think I saw very nearly all of the logs that were cut on the eastern tributaries.

In the summer of 1893 there were close to 500,000,000 feet of logs rafted out of the boom at West Newton. There was another place provided for storing these logs besides that part of the slough that was above the sorting and rafting works; that was at Minneiska. There was also a place on the Wisconsin side provided for storage, in Beef slough, and on the Mississippi on the Wisconsin shore, and there was provision made for taking, from time to time, these logs across the river into the West Newton slough. It would not be practical to run a boat through the slough at the present time.

There were two dams built by the United States Government, one at or near the head of the island, which forms the eastern boundary

of the slough, and the other at the lower end; that is what I call a wing dam.

There are others in the Mississippi in the channel outside of
127 the island. There was another dam at the head of the slough, further up, in 1893. I should think it was put in about 1883—1882 or 1883. Below the head of the slough the Government had done some riprapping on the shore, just at the end of the rafting works; that was put in since 1889. I don't think I was there when it was put in.

I know Mr. George Scott. He did not have or exercise any authority over me in 1893 in the performance of my duties.

I understand in some instances brails of logs were run out of the pockets where they had been made up before the scalers that had been employed by Mr. Mullen finished scaling the brail. There was no change in the method of doing the work there, that is necessary in the brailing, after General Mullen or his men commenced to scale, from what had been done before.

Q. Were there any brails of logs taken out of any other pockets and dropped down the river until it was necessary to do so in order to carry on the business there?

The defendant objected to the question as calling for a conclusion of the witness. The court sustained the objection; to which ruling and order plaintiff duly excepted.

It is twelve miles from the upper end of West Newton slough to the mouth of the Chippewa river. The Chippewa comes in just at the lower end of Lake Pepin. There is no perceptible current through Lake Pepin. I think they call it about twenty-five or thirty miles long, and it is on the average, perhaps, three miles wide.

On cross-examination the witness testified:

I have been through Lake Pepin on steamboats. I did not go through there on a steamboat at the opening of navigation this last spring. Speaking generally, there is no perceptible current through Lake Pepin. I have never seen any current there. I know there is a current there, because water goes down the stream, and there must be a certain amount of current there.

Lake Pepin is the Mississippi river widened out. The main channel of the Mississippi river runs through Lake Pepin.

128 During the season of 1893 when the lower tier of pockets was used for scrab-les I could not swear which one it was. By scrabbles I mean small lots of logs or logs where no owners claim them. I do not mean that the logs of indiscriminate owners are mixed up together and get into this pocket; it is small lots of logs where a party has a lot of logs, but not enough to make a pocket full; and also logs are put in there whose ownership we don't know. We didn't have any Mississippi River Logging Company pick-ups at West Newton slough in 1893. They went further down the Mississippi river. I did not turn them down the river at all. I can't say at what points we got the Mississippi River pick-ups that season; perhaps at La Crosse somewhere, and some below.

They were logs that would go by our booms. Some seasons more logs go by and some seasons less; some seasons quite a few.

We had no West Newton pick-ups, because logs that come down the Mississippi river, as far as possible, are taken in by our shear booms into the West Newton booms. Prize logs were put in the scrabble pocket in the season of 1893.

By prize logs I mean logs that have no mark.

I don't know why logs are called scrabbles any more than it is a name for them. I don't know how they came to be called that name. A stray log—we call stray logs, logs that stray out of their proper place. I don't know that we had any that run into the West Newton booms in the season of 1893. I think we put them in the second pocket below, not in with the scrabbles. Each mark had a duplicate pocket. If it goes by this pocket, we would put it in below here. Occasionally a log would get out of place. It frequently happened that logs of one particular owner got into a pocket which had been assigned to the logs of some other owner. When
129 that was done and the logs of an odd owner have got into the pocket of some other owner and were brailed up, they were not kept in the brail in that pocket in which they went; they were taken out. As far as my knowledge goes, they were always taken out. There might have been some logs that were not. I know of cases where they were not.

The scrabble logs after they were brailed in the season of 1893 were put in half rafts or rafts and kept and turned out in proportion to the owner. They were not divided up between the members of the Chippewa River Logging Company and the Mississippi River Logging Company. The Mississippi River Logging Company had nothing to do with them any more than that they bought them. They were not divided up between the members of the Chippewa Logging Company; they were divided up between the members who owned the marks that went in there—the different owners. They were never taken down the river and sold to the highest bidder; they were sold right below the boom there.

Every owner that had logs in there was given a proportionate share in these logs, according to his marks, if they knew his marks; every owner had his mark. I think the marks were all claimed; as far as I know, they were.

It often happens each spring that some people don't give their marks and the logs go into the scrabble pocket until we find the owner. I did not take charge of the division of these scrabble logs. The scaler made the division. The division was not always made at the close of each season. I can't say how often. No log division was made at any time until the close of the season. I didn't say that there were several divisions made during the season. When a party gets a brail he is entitled to 100,000 feet. For instance, if a brail is 100,000 feet, all right; if not, he is entitled to a brail
130 of 100,000 feet whether they are marked or not.

The dams I spoke of—one was at the head of the West Newton slough and one further up the river; just above. They were what I call wing dams; they reach out into the stream, but do

not reach clear across West Newton slough. We got our logs into the slough over the top of the dam. I suppose a dam was put in there to aid navigation. The Government put it in.

This map does not reach up far enough to show the Government dams. It does not show the head of the slough. The Government dams, I should say, are about four or five miles above the place denoted on the map by the letter "C." It was not put at the head of the storage boom. We have a row of piling running from the head of this island where the dam is probably three-quarters of a mile—probably half way up. It would be in a part of the Mississippi river, but a portion of it runs into the slough.

The witness then marked with the letter "M" a pocket, and testified:

I think that is the pocket we used for scrabbles in the year 1893. It was that one or the adjoining one. I don't know how certain logs came to be called prize logs; I can't say it was because whoever got hold of them took them as a prize, and that that particular name was adopted.

Mr. Weyerhaeuser was president of the Mississippi River Logging Company, and Mr. Irvine was secretary of the Mississippi River Logging Company.

When I was down at West Newton I took my orders from Mr. Irvine and from Mr. Weyerhaeuser—that is, Mr. Thomas Irvine.

I was there under Mr. Scott's orders at West Newton, as far as the office was concerned. Mr. Scott ran the office. If there were any orders coming from the office I did not get them from him about my work. If there were any orders coming from the office I got them from him, from the company to the office. They came through him, and I would get them that way. Sometimes
131 I got them direct and sometimes from Mr. Weyerhaeuser and Mr. Irvine through the office. I never got any orders from Mr. Scott directly. Mr. Scott never gave me any orders of his own accord.

On redirect examination the witness further testified:

I have every year had experience with the logs under my control getting up into Lake Pepin from the Chippewa river. Logs come out of the Chippewa river and go up into Lake Pepin with a south wind; if the Chippewa river is high and the Mississippi river is low they always go up there. Sometimes we take them out with a boat; sometimes we get men to keep them off the shore and let the wind blow them down again. I think all logs would stay by there all the time if they were not kept off the shore and brought down with favorable winds, or unless you had towboats.

132 Pick-ups are logs that get by the boom and go down the Mississippi river. We go after them with boats. There are years we pick them up as far down as Lansing; in 1893, I think, as far as La Crosse, at different places. The first place we pick them up is at Belvedere slough, just across from Minneiska, and a little above. The next place we pick them up is right along the Mississippi river, on both sides. We have a boom below Minneiska a short distance, on the Minnesota side.

We have another shear boom in there substantially like the one above, and shear them in there and raft them out.

From Lake Pepin to the shear boom where we turn logs into West Newton slough is nine or ten miles. From there to this boom at Minneiska it is very near the same distance—eight or nine miles. It is fifty miles from Minneiska to La Crosse by river.

All the rafting that is done on the logs, aside from putting the two brails together, is done in the pockets before they leave the pockets. Brailing and rafting have the same meaning.

Prior to 1889 the work of sorting and rafting the logs that came down the Chippewa river had been done at Beef slough, Wisconsin. Beef slough is one of the outlets of the Chippewa river into the Mississippi river, or was at that time. The lower end of that outlet is just below the shear boom that turns the logs into the West Newton boom. The main outlet of the Chippewa river into Beef slough is about fifteen miles above the main mouth of the Chippewa.

We left Beef slough and went to the Minnesota side of the river to do this sorting and rafting of those logs because Beef slough got filled up so we could not take logs through. It was necessary
133 to have some other place. We took over to West Newton all of the booms and fixtures that we had used at Beef slough and entirely abandoned Beef slough for that purpose.

During all of the time since we commenced business there, in 1889, the course of business has been that the owners took the logs away every day during the rafting season as soon as they are brailed up and dropped out of the fitting-up places. This is done because it is necessary for us to have room or close down our works. There is no room or place where logs can be held except temporarily almost in the channel of the river.

When I say Mr. Scott never gave me any orders of his own accord I mean that I had entire charge of the log work and of the outside work—outside of the office—and if I got any orders from Mr. Scott they did not originate with him, but they were repeated by him as coming from either Mr. Weyerhaeuser or Mr. Irvine. I don't think I ever got any orders from Mr. Scott in that way; I don't remember.

A paper was here shown, which was marked Plaintiff's Exhibit A, and the witness testified: This Exhibit A substantially represents the situation at the upper end of West Newton slough, where the logs are sheared in. The point marked A on the map is the point where the shear boom is attached to the Wisconsin shore. From there, extending diagonally down the river almost in a southerly direction, is a line of piling extending some eight or nine hundred feet to the point marked "*b*." From that point there are no pilings, but there is a continuation of timber forming the solid boom, extending down about 1,600 or 1,800 feet.

That part of the boom when it is in position to turn the logs into the slough is indicated by heavy lines drawn from
134 B to C, and when we wanted to let a steamboat or a raft through by some contrivance we caused it to swing until it reaches the position shown by the dotted lines B and D, and after the steam-

boat has gone through it swings back to C. This sand bar is a place where you can walk in low water from the boom on to the Minnesota shore, and this upper dotted line below the sand bar is the Government dam I spoke of, and this lower dotted line is the lower Government dam. Then, at a point a little way below the lower end of this swinging boom, there is an island or a series of islands, and that extends from the upper end of the island which forms the eastern boundary of the West Newton slough to this chain of islands. There is another line of piling that prevents logs from going into the river again after they get below the upper island. This lower line of piling is marked E. The point marked F is about at the mouth of Beef slough.

The paper referred to by the witness was then offered and received in evidence and a copy thereof is hereto annexed.

The boom on the Minnesota shore below Minneiska, where we turn in the logs we call pick-ups, is about a mile below the railroad station at Minneiska. It is in Wabasha county.

The plaintiff then called D. L. McKAY, who testified that he is fifty-one years of age and resides at Chippewa Falls, and is a lumber inspector of the sixth district, in Wisconsin, and has been for nine years; that during the years from 1880 to 1887 he inspected logs for Lindsay & Phelps Company cut on the Chippewa river and its tributaries.

That since 1886 or 1887 he has done the same kind of work on the Chippewa river for Chris. Mueller & Sons; that Chris. Mueller & Sons reside at Davenport, Iowa, and their business is manufacturing lumber. They are lumbermen and loggers.

Q. What marks had been placed upon those logs up to 1889? I don't care about anything after that.

135 The defendant- objected to the question as immaterial.

The COURT: How is that material in this case?

PLAINTIFF'S COUNSEL: We think it is material to show that the logs that came into the West Newton boom came from the Chippewa river, and we propose to show that these marks came from there.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiffs then called LEVI P. SMITH, who testified as follows:

I live at Chippewa Falls, Wisconsin, and have for twenty-three years; am fifty years of age. For the last fourteen years I have been employed by the Chippewa Logging Company, superintending portions of their logging business—the scaling.

I was so employed during the years 1888 to 1893, inclusive.

I performed my duties on the Chippewa river and the tributaries and Beef slough and West Newton. My duties on the Chippewa river for a few years were inspecting scaling; then I was inspecting and looking after the quality and grading and marks, etc.

During the years 1888 to 1893, inclusive, I think I was looking

after the grading; I would not be positive as to the first year, 1888; looking after the grade and marks, etc.

I was doing that for eight or nine years previous to the present time. My work extended over half or three-quarters of the Chippewa waters during that time. I worked in the territory generally that was not covered by Mr. Douglas. We both worked sometimes in the same territory. I looked after the quality of the logs and their grade and how they were cut.

136 I could not say how many camps I visited; fifty or seventy-five; perhaps more; over fifty at least. They were scattered over quite a large territory—over several different streams.

Travelling from one camp to another and making the circuit, I presume I would travel three hundred miles in the course of my travels. I saw practically all of the other logs were being put in by other parties in the same streams. I noticed the log marks that were being put on these other logs. I was familiar with most of the marks that were being put upon those logs, the Chippewa Logging Company logs.

I would learn it during the course of my inspection from seeing it or inquiring whose log it was or something to that effect. I am usually advised in the spring for scaling purposes, before the logs commence to be sorted down at West Newton.

During the time that the sorting and rafting of logs was going on my duties were looking after the scaling and getting it done; the scaling of the logs running through, the logs running through there—that is, in 1893—also those that didn't run through, or that were picked up, or that the company picked up. I employed myself all of the men who were engaged in doing that business, both scalers and tallymen. They were supposed to be, and were, practical scalers; mostly men of large experience. They were all of them men who had been employed during the winter months in scaling the same class of logs on the Chippewa river. In addition to employing these men I had the general oversight of them. I was there practically every day during the time the scaling was going on. I might have been away for a day or two once in a while. From time to time I saw the different marks of logs that were coming through the boom; I think all of them.

137 Previous to 1889 this work of assorting and rafting the logs that came down the Chippewa was carried on over at Beef slough. I was employed in the same capacity over there.

After a quantity of logs had been cut and put into the Chippewa river or its tributaries up in the pine country there is a liability that some of them would come through the sorting works for, perhaps, fifteen or twenty years. The bulk of them would probably come in within five or six years; after that they would scatter along, a few logs or a log or two.

In the year 1893 the logs which came through the West Newton boom and were scaled there under my supervision bore the same marks as the logs I had seen in the performance of my duty as inspector during the previous years, as far back as 1889.

The scaling is done by the marks. We scale each log by the mark that is on the log, and the scalers put down the mark that is on the log and enter it. I used to rescale some brails of logs, and counted a great many to ascertain whether the scalers were in fact doing their duty. I kept a general eye out on them and looked after them.

I was present in court when the deposition of Mr. Stanley Campbell was taken and heard what he testified to with reference to the method pursued by him while scaling logs there. That was the method pursued by all of our scalers there generally. I never gave any of the scalers or talleymen there any instructions, either directly or indirectly, to scale or tally any logs in any manner different, whether as to the contents or the marks upon them, from what he actually found on them lying in the water. The logs that came through the West Newton boom in 1893 came from the Chippewa river and its tributaries in the State of Wisconsin. All of the logs
138 that are cut and put on the banks of the Chippewa river and its tributaries for the Chippewa Logging Company do not come down to West Newton; some of them are stopped at Chippewa Falls and Eau Claire. Different members of the company take them there.

The members were the Empire Lumber Company, the Valley Lumber Company, the Dalles Lumber Company, and the Northwestern Lumber Company. These companies are companies which have saw-mills and manufacturing plants along the river at Chippewa Falls and Eau Claire. Also the Chippewa Lumber & Boom Company takes them at Chippewa Falls. They also have a manufacturing plant at Chippewa Falls.

Q. You may state how, if you know, these logs are scaled that are taken in by these companies that you have named at Chippewa Falls and Eau Claire.

The defendant objected to the question as immaterial.

PLAINTIFF'S COUNSEL: The object of the testimony is to show that all of the logs of the Chippewa Logging Company everywhere after they leave the bank are scaled for the purpose of enabling the company to make a fair and equitable division among themselves of their property. The property, as will appear by the witness' testimony later on, is acquired by the Chippewa Logging Company from the various members of the corporation in proportion to the amount of money that is contributed to acquire the property. Then, as the logs come down the river the proportion of the Chippewa people is taken out, and the balance of the logs goes on down the river. This is done—and in order to make a fair and equitable division of their logs, the logs are scaled full.

The court then sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by this witness that all of the logs of the Chippewa Logging Company and of the Mississippi River Logging Company which came down the Chip-
139 pewa river, whether they are taken at Chippewa Falls or Eau

Claire by members of the Chippewa Logging Company or whether they are assorted and divided among the members at West Newton, are scaled full—that is, without making any deduction whatever for rot, crook, or other defects that may appear to be in the logs.

The defendant- objected to such testimony as immaterial.

The court sustained the objection; to which ruling and order plaintiff duly excepted.

PLAINTIFF'S COUNSEL: I propose to follow this up by the testimony of other witnesses and by the testimony of this witness, showing that the scaling is done in this manner for the purpose of making an equitable division among the members of the Chippewa Logging Company and the Mississippi River Logging Company.

The defendant- objected to the offer as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

I know what are known as pick-up logs and scrabble logs. They are also scaled under my supervision. I also know what are known as prize logs—that is, logs that have no designating mark upon them at all that we can find. When they are scaled they are marked and put down as prize. All logs that have no mark upon them are scaled, if they are not culls. They are not scaled at all if they are culls. Scrabble logs and pick-up logs are all scaled straight and sound and otherwise scaled to the mark the same as all other logs.

In reference to pick-up logs there may be some exceptions—that is, where there are a lot of logs that break loose, that belong to steamboats, they were scaled full. They were sorted—we don't call them pick-ups, although one might call them pick-ups—that is, those that might get into the sorting works and be sorted there.

On cross-examination the witness testified:

As far as I know, every log that went into the West Newton booms there in 1893 was from the Chippewa river—cut on the Chippewa river. I mean by that that I have no immediate knowledge that any particular log was cut anywhere else than on the Chippewa river. I was not present when all of these logs were cut on the Chippewa river. I know from seeing some marks on logs there. That's all I know. I don't pretend to carry in my head every mark that run through West Newton boom in 1893. The majority of them I did at that time.

I have been acquainted with the Mississippi river for a number of years. I know that the business of bringing logs down the Mississippi river has been conducted for a long number of years past. I know that logs came down the Mississippi river and came down the Mississippi in 1893 from Stillwater, in this State. I saw rafts going by that I supposed came from Stillwater. I suppose in the course of my experience I have learned that logs are brought down the Mississippi river from points above—logs which come from Minnesota. I know where Reed's landing is. It is at the foot of Lake Pepin—that is, below the mouth of the Chippewa. I should think half a mile or a mile below Lake Pepin. There is a

railroad bridge there at the landing that crosses the Mississippi river there. I do not know personally of rafts of logs coming down through Lake Pepin to this railroad bridge and being broken up on this bridge. I can't say that I have heard of it. I suppose if a raft coming down from above should break up at that rail-
141 road bridge, they could pick them up. If they didn't pick them up and turned them loose and drove them down, I presume they would come into the West Newton booms. They would come without driving if they were not lodged in the piles or on the banks. They could float. I don't know that logs didn't go into that boom. I can't say that they did or didn't. I can't say where they came from.

The plaintiffs also offered in evidence in rebuttal the deposition of ARTEMUS LAMB, which was taken in the case of C. Lamb and Sons against the defendant, John H. Mullen, under a stipulation in that case, as well as in the case of Lindsay & Phelps Company *vs.* John H. Mullen, which, among other things, provided "that the evidence of any witness taken by either of the parties to either of said actions pursuant to said stipulation might be read in evidence in either of the other actions in which such deposition might not be taken in the same manner and subject only to the same objections which might have been made if such deposition had been taken in each action, it being the purpose of this clause in said stipulation to avoid multiplying depositions or evidence of the same witness."

This witness testified as follows:

I am fifty-seven years of age and reside at Clinton, Iowa, and have resided there for forty years. I am secretary and treasurer of C. Lamb & Sons and have held that office twenty years—ever since they were organized. I am also vice president of the Mississippi River Logging Company and have held that office twenty years.
C. Lamb and Sons are stockholders in what is known as the
142 Chippewa Logging Company. I do not hold any office in that company. The principal business of C. Lamb & Sons is saw-milling—that is, taking logs and manufacturing them into lumber; also running steamboats and bringing logs from the Chippewa and its tributaries to their mills.

They own and operate four mills at Clinton, Iowa. In and prior to the year 1893 they got their logs to manufacture from the Chippewa river mostly.

C. Lamb & Sons, as a distinct corporation, carried on a distinct logging business on Chippewa river during the year 1893 and prior to that time. We owned some pine land up there and contracted the logs floating.

Our company, as a distinct and individual corporation, sold their logs to the Chippewa Logging Company, which is commonly known as the pool.

Q. I wish you would state the method of doing business by the Chippewa Logging Company from the time that the logs were cut in the woods until they were sorted out of the booms, or wherever

they were sorted, and how the division is made between the various members of that company of the logs which belong to that company.

The defendant- objected to the question as immaterial and incompetent, as being a question which the court has already ruled out, and also because this matter is carried out by the books of the company, to which the defendant has no access.

The court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiffs then offered to show by this witness in his deposition that the logs are cut from timber owned by the Chippewa Logging Company by their own men and teams or by jobbers and delivered in the waters of the Chippewa, and that they were
143 driven by what is termed a driving company down to Eau Claire, on the Chippewa; that when they got to Chippewa Falls and Eau Claire certain members of the Chippewa Logging Company are entitled to a certain percentage of the logs cut or bought the previous year. It is the custom to take into the boom a certain number of hours or days, and then they are passed down the river for a certain number of hours or days, which is determined by the per cent. that belongs down the river and by the per cent. that belongs at Eau Claire. Then there are scalers appointed by the Chippewa Logging Company for each mill which belongs to the pool. This has reference to the Chippewa Falls and Eau Claire members. They are at the foot of the slip and scale all logs as they come. These logs, then, that belong to the Mississippi River Logging Company are brought on to West Newton, Minnesota, and there they are boomed and rafted by the Mississippi River Logging Company and are scaled by scalers appointed by the company by the same methods that are used at Eau Claire. The method of scaling at Eau Claire is what is termed the full scale—that is, without making any deductions for defects—and the same thing is done at West Newton—that is, for adjustment between the members of the company—that is, between the Eau Claire people and the Mississippi River Logging Company; that the proportion or percentage of the logs that each member of the Mississippi River Logging Company is entitled to take is arrived at by the amount of their subscription to the original capital stock of the company. It was not subscribed in dollars and cents, but in so many million feet per year; practically in proportion to their holding in the company; that the method of scaling what is known as the pool logs,
144 according to the full scale, is the result of an agreement between all the members of the Chippewa Logging Company and all of the stockholders.

The defendant- objected to the testimony so offered as immaterial, and the court sustained the objection; to which ruling and order the plaintiffs duly excepted.

Q. What was the reason of making or adopting that method of scaling (referring to a previous answer of the witness, in which he testified that the method was the full scale)?

A. It was much easier to find scalers who were capable of measuring a full-sized log than it was to find those to measure and make the proper deduction for the defects, and it was also thought that it would be easier and safer as between the parties to measure them in full, because they could then follow the logs more readily if they should send a detective around to see if the scalers were doing their duty as between the parties.

It would be much easier to check up the individual work of the scalers. The members all getting the same logs, it was immaterial on what basis a scale was made if it was made alike to all—that is, so far as the members were concerned.

In the division of these logs, these pool logs, among the members of the company, such of them as came down to West Newton and were rafted out there in the way I have described, it is not known which particular member of the pool will get any given brail of logs until the boat arrives there and reaches them.

Q. State what the general rule is as to whether there is a raft of logs then ready for him to take away from the booms or whether the boats usually have to wait for the logs to be sorted and rafted after their arrival there, if you know.

145 The defendant objected to the question as incompetent, immaterial, and no foundation laid.

Plaintiff's counsel here called the court's attention to the following allegations in the answer:

"That while said logs ar- passing through said boom in said slough they are gathered together into brails and rafts and thereafter towed and floated down the Mississippi river to be used for commercial purposes, and are oftentimes sold in bulk in the rafts, and in case of such sales the purchasers, as a general rule, are obliged to rely for the quantities in such brails and rafts contained upon the scaling survey and measurements made at said boom at the time said brails and rafts are made up; that when logs passing through said boom are scaled, surveyed, and measured by parties interested therein, it has been found, as the fact is, that many errors and mistakes creep in, and it oftentimes occurs that such mistakes are made purposely, so that rafts and brails when made up, as aforesaid, do not correctly and accurately show the quantities of logs actually therein, although they nominally purport so to do; that said boom Co. is and was at all the times herein mentioned owned and controlled by persons and individuals who are engaged in and pecuniarily interested in the business of logging and lumbering, and from time to time it becomes and is for the pecuniary interest of said boom company and those interested therein that correct measurements, surveying, and scaling the logs passing through said booms should not be made, and in many instances said boom company and persons interested therein have prevented and endeavored to prevent true and correct measurements, surveying, and scaling from being made through the persons duly authorized by law so to do, particularly including this defendant; that after said brails of logs are made into rafts at said booms, they are oftentimes

towed down said Mississippi river, and compensation is paid therefor to the steamers and towing companies for such towing, and such compensation is based upon the amount of timber in said rafts and each of them; that in a great many instances rafts of logs are
146 made up in said booms to be taken down and the same are taken down said river to be sawed at mills owned or controlled by persons pecuniarily interested in or controlled by said boom company or owned by corporations, persons, or firms closely allied to said boom company and its owners and stockholders and whose pecuniary interests are substantially identical with those of the owners of said boom, and it frequently occurs that where said rafts are towed down said river from said booms to mills so owned, operated, and controlled, as aforesaid, that the logs in said rafts are scaled by or at the instance of persons *persons*, firms, or corporations interested in having them appear to contain as small a quantity as possible, with the effect that they do show, when so scaled, a less quantity of logs therein than actually exists, and in other cases where the logs in said rafts are to be sold and disposed of in the market they are scaled or caused to be scaled by the parties interested therein so as to make it appear that the logs in said rafts are much greater in quantity than is actually the case; that the only way to prevent such errors and mistakes," etc.

The object of this testimony is to show that, as a matter of fact, it is impossible to show any such discrimination as is alleged in this answer, because nobody knows where the brail or raft that is being scaled is going to or who is going to get them. The logs that are to go to members of the boom company, nobody knows where the logs are being scaled; whether they will go to A, B, or C. They will go by the first boat that will come, and nobody knows which boat is coming first. Consequently, there is no object for any such discrimination as is alleged in the answer. Also the defendant testified that logs were towed according to the number of feet contained in the raft, and we propose to show that there is no object to show any favoritism or make any discrimination whatever. Will defendants admit that there is no discrimination as far as pool logs are concerned?

The COURT: There is no testimony on the part of the defendant to sustain that allegation in the answer. The question seems
147 to me to be immaterial at this time.

The court then sustained the defendants' objection; to which ruling and order plaintiff duly excepted.

The witness further testified:

The members of the Mississippi River Logging Company and down-river members of the Chippewa Logging Company, outside of the Mississippi River Logging Company, if there are any, are themselves large manufacturers of lumber. Occasionally some member will have a few more logs than he can use himself, and he, perhaps, will sell them. I should say ninety to ninety-five per cent. of the pool logs that come out of the West Newton booms are manufactured by the members of the pool to whom the logs are delivered there.

Q. Would it be possible to make a fair adjustment between the Eau Claire and the Chippewa Falls members of the pool company, whose logs are taken out at Eau Claire and Chippewa Falls, and the down-river members of the company if the logs that come through above West Newton booms were scaled what is termed straight and sound—that is, by the individual scalers using their judgment in making such deduction as would be necessary to make the logs sound, merchantable logs?

The defendant- objected to the question as incompetent, immaterial, and calling for a conclusion of the witness.

The court sustained the objection; to which ruling and order plaintiff duly excepted.

Q. How long has the business of these companies been conducted in the same way that it was conducted in 1893, prior to that time?

The defendant- objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

148 The plaintiff then offered to show by this deposition that the Mississippi River Logging Company had conducted the business in the same manner for twenty-two years, and that the pool had been in existence about thirteen years up to that time.

The defendant- objected to the offer and testimony as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The witness further testified:

These logs had not always been assorted at West Newton prior to 1893. Originally we handled them over at Beef slough, on the Wisconsin side of the river.

Q. And were they handled in the same way there?

The defendant- objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The names of the different people or corporations who were members of the Chippewa Logging Company or who were members of the Mississippi River Logging Company who took logs at West Newton and prior to the time the West Newton booms were opened took logs at Beef slough—that is, the down-river members of the pool were:

Yoemans Bros. & Hodgins, Winona; Laird, Norton & Co. and the Winona Lumber Co. of Winona; W. T. Joyce, of Lyons, Iowa; C. Lamb & Sons, of Clinton, Ia.; Dimmock, Gould & Co., of Moline; Rock Island Lumber Co. of Rock Island; Weyerhaeuser & Denkman, of Rock Island; Musser Lumber Co. of Muscatine; Hersey Lumber Co. of Muscatine, and W. J. Young & Co., of Clinton, Ia.

C. Lamb & Sons did not have any logs in the summer of 1893 that were run into the booms at West Newton to be sorted
149 out there, except such as were cut on the Chippewa river or its tributaries, in the State of Wisconsin.

The plaintiffs also read in evidence in rebuttal the deposition of G. W. CABLE, who testified as follows:

I reside at Davenport, Iowa, and have for over thirty years. I have been engaged in the lumber business for the last fifteen or twenty years as the corporation named the Cable Lumber Company. I am president of that company and have been ever since its organization. I have general charge of the business. The principal office of our company is at Davenport, Iowa. In 1893 I had one or more saw-mills for the manufacture of lumber, and it also carried on the logging business for the purpose of supplying its mills; mainly on the Chippewa river at that time.

The destination of the logs that were cut by the Cable Lumber Company on its own lands and banked on the Chippewa river or logs acquired by the company in any other way on the Chippewa in 1892 or 1893 or in prior years was our saw-mill in Davenport for manufacture there.

I don't think I ever saw defendant John H. Mullen. I know where the booms known as the West Newton booms are located on the Mississippi river. Our company had logs coming through that boom in 1893.

Q. Did your company make some arrangement or agreement with the Mississippi River Logging Company to scale such logs as they might have coming through that boom that year?

The defendant- objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by the deposition of
150 this witness that before the business of assorting and rafting the logs at West Newton boom commenced in the summer of 1893 an arrangement was made between the Mississippi River Logging Company and the Cable Lumber Company by which the Mississippi River Logging Company agreed to scale all of the logs of the Cable Lumber Company for a fee which was agreed upon, and the Cable Lumber Company agreed that the Mississippi River Logging Company might scale them.

The defendant- objected to the testimony, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered in evidence the deposition of FRANK W. MUELLER, who testified as follows:

I reside at Davenport, Iowa; I am in the lumber business, a member of the firm of Christian Mueller & Sons. I have been connected with that firm since 1879. The business of the firm is saw-milling and lumber yards.

Q. In 1893 and prior to that time where did you get your logs to manufacture?

The defendant- objected to the question as immaterial because the deponent is not a party to any of these cases.

The counsel for the plaintiff stated that the object of this testimony as well as the testimony of several other witnesses is to show that they were lumber manufacturers in Iowa, and that they cut

logs on the Chippewa river and ran them down through these booms for the purpose of supplying logs for their mills.

The COURT: It is just as well to show there were two or three as to show that there were a great many.

PLAINTIFF'S COUNSEL: I think this is material upon the
151 question of interstate commerce. If all the logs that went in there were subjects of interstate commerce, and had never become a part of the general property of the State of Minnesota, then it must be said that this is a regulation of interstate commerce, and it is for the purpose of raising that question that this testimony is offered.

The court sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to prove by the deposition of this witness that all of their logs during the year 1893 were cut on their own lands on the Chippewa river or bought on the banks of the Chippewa river and run down through this West Newton boom and taken to their mills at Davenport to be manufactured; and the plaintiff offered to follow that testimony up by the testimony of a large number of other witnesses that their logs came through in the same way, and by evidence showing that they were substantially all the logs that did go through the boom.

The defendant- objected to the testimony so offered, and the court sustained the objection; to which order and ruling the plaintiff duly excepted.

The plaintiff then offered and read in evidence in rebuttal the deposition of D. J. BATCHELDER, who testified that he lives in Clinton, Iowa; that he was a member of the firm of Gardiner, Batchelder & Welles in 1893 and prior to that time; that he had charge of their logging business and looking after their logs, rafting, and looking after them in a general way.

At that time they were engaged in the manufacture of logs and lumber at Lyons.

Q. Where did they get their logs?

152 The defendant- objected to the question as immaterial because these parties are not parties to the suit in any way.

The court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by the deposition of this witness that all of their logs that were rafted from the West Newton booms came out of the different tributaries of the Chippewa from different streams, and that that had been true for a number of years before 1893.

The defendant- objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by this witness that substantially the same agreement was made between the firm of Gardiner, Batchelder & Welles and the Mississippi River Logging Company with reference to the scaling of the logs of that firm that came

through the West Newton booms in 1893 as was made with the Cable Lumber Company.

The defendant- objected to the testimony so offered as immaterial, and the court sustained the objection; to which order and ruling the plaintiff duly excepted.

The plaintiff then offered and read in evidence the remainder of the deposition of J. B. PHELPS, who testified as follows:

I don't think Lindsay & Phelps Company, during the summer of 1893, sold any of its logs. The general course of our business is not to sell our logs. We saw them. When our logs were cut and banked on the Chippewa river or its tributaries or purchased there, they are cut for our mills and are intended to cut them there. We do most of them there.

Our company made an arrangement or agreement with
153 the Mississippi River Logging Company to scale our logs for us that year. We had a letter from Mr. Weyerhaeuser wanting to handle our logs in April—the 25th of April.

The witness then identified a paper which was marked Exhibit A as the letter referred to, and said letter was offered and received in evidence, and is as follows:

"MINNEISKA, MINN., *Apr. 25th*, 1893.

DEAR SIRS: We are obliged to scale our logs for boomage this season, and if a satisfactory arrangement can be made would like to scale all your logs passing through the boom.

We will scale your logs for 3½c. per M, in addition to the regular charge for brailing and boomage.

If you or your agent have any preference among the scalers employed here you can have the scalers you wish to scale your logs named by your agent, the scaling all to be done under the personal supervision of Mr. L. P. Smith, who has had charge of our scaling for many years and of all the scaling for the past two years.

We will guarantee that all shall be done to your entire satisfaction.

Yours truly, F. WEYERHAEUSER."

The witness further testified:

That letter was answered by our company. Here is a copy of the answer.

The paper referred to by the witness was marked Exhibit B, and the witness testified: The signature to Exhibit B is in my own handwriting. I dictated it to a typewriter and signed it myself.

Exhibit B was then offered and received in evidence, and reads as follows:

154 "DAVENPORT, IOWA, *April 29th*, 1893.

Mr. F. Weyerhaeuser, Minneiska, Minn.

DEAR SIR: Your letter of the 25th received, and in reply will say that we would like to have Mr. Smith scale our logs or see that it

is done, and by one man all of the time; and the same man should be the scaler for the Cable Lumber Co.'s logs, as we have marks owned in common and divide them sometimes to suit our convenience, and should prefer to have them scaled for what sound lumber there is in them as we might sell or buy.

Yours very truly, LINDSAY & PHELPS CO."

The plaintiff then called BENJAMIN F. NELSON in rebuttal, who testified as follows:

I reside at Minneapolis, and have for thirty-two years. My business is that of a lumberman, including in that term the business of cutting and running logs down the river to Minneapolis. I was employed in the lumber business, but not cutting or running logs during all of the thirty-two years. I commenced cutting and running logs about fifteen years ago, and have been employed in that business ever since. I am familiar in a general way with the course of business of logging upon the Mississippi river above Minneapolis. When logs come down the Mississippi river to Minneapolis they are gathered together and held by some corporation known as the Mississippi and Rum River Boom Company, I believe. At that time they are in a general mass, everybody's logs mixed with everybody's else. The logs are sorted out by that company and turned to the mills of the owners of the logs, providing the owners of the
155 logs have mills. If not, they are turned to any mill that the owner may direct the logs to go to. What are intended to go below Minneapolis are turned over the falls by this company, so that, except those logs that are intended to go below Minneapolis, all of the logs are assorted by this boom company and turned by the boom company to the several mills where the owners own mills, and where the owners do not own mills they are turned to the mills where the owners direct them to be turned.

Those that are turned over the falls are gathered in a raft by another company called the St. Paul Boom Company. No logs that are cut above Minneapolis are ever driven in a loose mass below this St. Paul boom, unless it is a log that escapes in a freshet. Then they are driven to points where they can raft them conveniently. Nearly all the logs that come over the falls and are not caught in the St. Paul boom stop in what we call Pig's Eye lake. It is a slough or lake a little way below St. Paul, six or seven or eight miles. Those that don't go in there gather in a slough below Hastings, and scarcely ever get as far as Red Wing, and it is in these places that I have mentioned that they are gathered and rafted up or put in booms, or something is done to them below.

After the logs are assorted in Minneapolis and turned into the respective mill booms they are all scaled by the surveyor general or his deputies. There are errors that occur in assorting the logs which are corrected in the scaling, and there is an account kept of logs that get into the wrong place. If by any chance logs that are not destined to go below Minneapolis are turned over the falls they are caught in the St. Paul boom and are assorted and scaled there, and an account of them is kept in the same way that there is with

those that are assorted at Minneapolis. The logs that escape
156 in freshets and go down as far as I have testified they do sometimes are gathered together and rafted or sold without being rafted, and are scaled by the same officer.

I have seen Lake Pepin, so that I have a general knowledge of what the body of water is. I have had considerable experience in driving loose bodies of logs, or in having charge of that work, above Minneapolis, on the Mississippi river, and below. I don't think there would be any logs pass through Lake Pepin that went over the falls of St. Anthony, unless they were being towed in a raft, or some other body of logs that lumbermen got together and fasten in a boom. In several years, say there was 100,000 logs went over the falls of St. Anthony, I don't believe there would scarcely any of these logs get through Lake Pepin, if they were taken care of, in several years.

Last spring there was quite a considerable amount went over that was not scaled at the St. Paul boom. That is considerably the largest amount that has gone over for a long time. As a rule, practically, all the logs that go over the falls of St. Anthony are those that are put up by a raft or brailed by the St. Paul Boom Company. They are all caught in the St. Paul boom except what logs go out in a freshet or in the ice, as they did last spring.

On cross-examination the witness testified:

Practically, every log is caught there in the St. Paul boom. Of course, some small logs may work its way under the boom to get by, but it would be such a small amount it wouldn't be worth considering. I never made any estimate of the amount that gets away in that way. I never made any examination of the amount that gets away in that way. I never knew any of them to get away; not enough to call the attention of any one to it.

157 Sometimes rafts going down the Mississippi river are broken and get scattered in that way, when the rafts break up. Sometimes below Lake Pepin they break up.

I have made an examination of Lake Pepin to ascertain the number of logs that run into it. We have had some logs escape from Minneapolis about six or seven or eight years ago, and I was appointed by the log-owners to gather them. I went to Lake Pepin at that time and made an examination of the situation and found there were no logs came there. It was several days after they escaped that I made the examination. I went down soon after they escaped, stopping at Hastings. I found there were very few logs came there, practically none. I went to Red Wing and they hadn't seen a log. I went on to Lake City and spent a day there, and found, of course, there hadn't been any logs in the habit of coming there, and on my return I found that practically all the logs that escaped were caught in what we call Pig's Eye lake and the sloughs between. They had hung up there between here and Hastings, just a few below. I base my testimony as to logs running into Lake Pepin or not running into Lake Pepin largely on that examination I made six years ago and what I have known where logs were gathered up since that and before. It would take several years for them to get down there, and

it would take several years more for them to get through Lake Pepin. Lake Pepin is twenty-eight or thirty miles long, and the wind would have to blow continually from the north or northwest to get a log through the lake, which is hardly ever the case. I presume Lake Pepin freezes at times. I don't think it would be probable that when the ice goes out it would take with it some logs that were in the lake, because the ice would be as liable to throw the logs upon shore, and a good deal more so, than it would to take them
158 out. I suppose if some were at the lower end of the lake, and the ice broke up with a northwest wind or a north wind, it would shove the logs and the ice into the river. I don't know anything about logs that come out of the Chippewa river being driven up into Lake Pepin. Whether they are as likely to be driven out of Lake Pepin as they are to be driven into Lake Pepin would depend upon the distance. They could be driven out of the end of a lake thirty miles long easier than they could be driven through the lake. Logs this side of Lake Pepin would have to be driven by the wind twenty-eight or thirty miles. That is the distance, I think, that Lake Pepin is long.

The plaintiffs also called CHARLES A. SMITH, who testified as to the method of doing business at Minneapolis and on the St. Paul boom substantially as the witness Nelson. The witness also testified:

Some logs, in the assorting of the great number that come down to Minneapolis, get into the wrong places—that is, my logs might get into the mill boom or other booms of some other owner, and *vice versa*. We call these logs, in our parlance, "exchanges." When this happens, these logs are sawed up by the company in whose boom they run, and a record is kept by the surveyor general. The owner of the logs that stray or become exchanges, as we call them, in that way never gets the identical logs. They are settled for either by paying with other logs or with money. That is the uniform practice among the lumbermen that are engaged in doing business at Minneapolis. There was no way to get at the logs for the exchanges, except by an examination and measurement of all the logs in the boom. In order to find out whether or not the logs have been assorted clean, or whether there are logs of one owner intermingled with the logs of another owner, at his mill or in his pocket, it is necessary to go over the entire mass of logs that run into the boom.

The plaintiff also called in rebuttal C. E. SINCLAIR, who testified that he has resided in Minneapolis twenty-six years; that he
159 is a deputy of the surveyor general of the second district of this State, and has been such deputy for ten years; that he manages the office and directs the scalers where to go and where to do their work; has general supervision over them; that the records or tally-sheets are turned in to him, and that he was performing the same duties about the office in 1893, and that he has performed the same duties for the entire ten years.

That after the logs are gathered together by the Mississippi River & Rum River Boom Company they are all scaled by some deputy of the surveyor general's office and the scale bills are returned to each owner. They have a system of exchange in Minneapolis, and each manufacturer has what they call a lo*k* book. He is charged with what logs he gets outside his own, and is credited with his logs when his logs go to others, and the logs that go down to the St. Paul boom are also scaled by the surveyor general in the boom after they have been assorted, and that these logs are accounted for to the owners in the same way substantially as the Minneapolis logs; that from time to time logs escape from both these booms and go down the river, and these logs are scaled by his office wherever they are picked up and accounted for to their owners.

The St. Paul Boom Company or the Minneapolis Boom Company from time to time picks up logs that stray away down the river, and have in previous years done so, and these have been scaled by our office. They have done so upon request. I don't know of their picking up any except in freshets of this kind.

On cross-examination the witness further testified:

The St. Paul boom is managed by the St. Paul Boom Company. I don't know their manager there. Our office undertakes to scale all the logs running out of that boom. The logs scaled by us, 160 which were scaled by request of the owners, were scaled at St. Paul, at the boom, while they were being brailed and rafted. We learn when the boom company is going to turn to rafting; we keep men there. We scale logs; we are scaling now, and have been this summer, the logs that got away this spring. We have a deputy at Red Wing and another at Hastings. We have two men at what we call Finnegan slough; that is probably about twenty or twelve miles below St. Paul—something like that.

On redirect examination the witness testified:

These logs that we have scaled up by special request below the St. Paul boom have been scaled by the request of the Mississippi and Rum River Boom Company.

The plaintiff also called THOMAS H. SHEVLIN in rebuttal, who testified substantially as the witness Wilson, and further testified:

During the time that these logs have been turned over the falls and since they have been turned over the falls we have had all the way from thirty to sixty million feet a year turned through the boom at Minneapolis. Last year we had a very short season and had thirty-four million feet through at Minneapolis, and we had scaled down at St. Paul boom over 60,000 feet.

Of course, we do not want them to go there, but we had rafted, assorted, and brailed in St. Paul over sixty thousand feet. Occasionally, every month or so, I have sent my men down the river to see how many of our logs came over the falls. They are watching them all the time. Of course, we don't want them to go over. We want them for our own mills. We found over 60,000 feet went down the river to St. Paul. That was less than half of one per cent. During that time we have never made any inquiry for any of our

logs below the St. Paul boom. When a log goes out of the St. Paul boom the river pirates soon jerk it out; it never gets very far; it will never get to Beef slough.

161 On cross-examination the witness testified:

I think the number of logs that reach Minneapolis in the season varies from two hundred to four hundred million feet, according to the season—some seasons more and some less; some seasons more than others. Last season I think it was some three hundred million feet. During the years from 1889 to 1893 the average, including those turned over the falls, I should think would be about three hundred fifty million feet a year.

Thereupon the plaintiff, to sustain the issues on its side, called RICHARD A. CHUTE, who testified, upon direct examination, as follows:

Have resided at Minneapolis for about four years; formerly lived at Eau Claire, Wisconsin, for eighteen years; am treasurer and manager of the Mississippi and Rum River Boom Company, and also of the St. Paul Boom Company. The Mississippi and Rum River Boom Company received the logs as they come over the dam, drives them to Minneapolis, assorts them at Minneapolis, and delivers them to the owners at their mill ponds or wherever they belong. It also turns into what is known as the St. Paul trail logs destined for below. The St. Paul Boom Company receives logs as they come over the falls, drives them to the boom limits in St. Paul, just below Fort Snelling, and there rafts them into brails for passage down the river. The scaling is done at the mills or at the ponds of the different mills; the logs are delivered at the mills. The company's revenue comes from the records of the surveyor general as to these scales, so whatever revenue the boom company receives is from these records of the surveyor general—that is, with reference to the Mississippi and Rum River Boom Company.

Q. What, if anything, is done by the company with the logs after they come down to the St. Paul Boom Company?

A. What is done with the logs?

162 Q. Yes; with reference to scaling them.

A. They are scaled as they are brailed at St. Paul.

The WITNESS: There is only an occasional lot that might slip under the boom when they are being sorted. We have a watchman for that purpose; he is supposed to catch them all, but if any one should get away and go below that it is picked up in short season. I send a crew to look after them and see that all logs are found that have got away from the boom or have drifted away from rafts; they are all picked up and scaled. I have had personal experience during the present year with large quantities of logs getting away from both of these booms and going down the river; have had general supervision of the work of caring for and securing these logs. Our crew, looking for these logs, has been as far down as Red Wing. The logs themselves have not reached Red Wing as far as I have been able to discover. Logs reach Diamond Bluff, which is about 7 or 8 miles this side of Red Wing, and that is the last point at

which we can discover any logs. The last time I was down there, just about a week ago, our man told me he had discovered a few logs in what is known as Red Wing lake, just opposite Red Wing, and he was going in there to see if there were any in there at that time. He didn't know whether they came from this lot or not, but, at any rate, he was going to see; but, with that exception, we didn't find any as far down as that. It is about six miles from Red Wing to the upper end of Lake Pepin. I also have had some experience this year with some rafts and logs that were laid up last fall down near Red Wing somewhere. They broke up this spring; some of those logs got into Lake Pepin. We have been engaged all the summer picking them out. I don't know how far down we found these logs, but most of them right this side of Lake City, I should say from what knowledge I have of it; I haven't been with the crew all the time, but have been there occasionally; most of the time has been expended above Lake City. I think that is about half way down the lake. I should say there were in the
163 neighborhood of four million feet of these logs. There were 23 brails, and I think they would average about 150,000 feet to a brail. I never had any immediate charge of a log drive. These logs that broke before they reached Lake Pepin were in rafts and brails that lay in Lake Pepin for winter quarters. They were in pretty bad shape when the ice went out when the rush of water came this spring. I was in Minneapolis during the year 1893. I was familiar with the course of business there with these two boom companies during that year. It was identically the same as it has been ever since under my charge, I think. My recollection is that in the year 1893 there were turned over the falls of St. Anthony and rafted out of the St. Paul boom from twelve to fifteen millions of feet, as I recollect it. My recollection is that they belonged, most of them, to the Mississippi River Lumber Company—more than half of them—and to J. J. Joyce and Lyons, of Clinton, and I think Mr. Betcher, of Red Wing. I was manager of the Mississippi River Lumber Company. Eventually the logs of that company went to points down the river to various parties; they were rafted without *o*rting; they were put together just as they were in the boom without putting on any particular mark. If the Mississippi River Lumber Company sold these rafts or these brails of logs to different parties or individuals, then different parties or individuals had the same mark of logs that they took down the river.

On cross-examination the witness testified:

We estimated twenty-five millions of logs went over in the spring with the spring of 1897 freshet, and I think probably that we turned over twenty millions more than went to the boom; that twenty-five millions went over during the freshet or escaped before the booms were in position; they went with the ice. As fast as these logs are gathered in Lake Pepin they are turned out loose at the
164 mouth of the Chippewa river. We put them in brails to get them across the lake and use a boat to take them across. We are hauling them out of the lake as fast as possible, as the crew can do it. We go down to Reed's landing and drop them there; we go

as far as Reed's landing and drop them just below the lake. From that point they are floated as loose logs. We have no scale of them as yet and cannot tell how many have floated down. The scale is made at West Newton boom.

Plaintiff then called CHARLES A. STAPLES in rebuttal, who testified as follows:

I reside at Stillwater, Minnesota, and have ever since 1865. My business is lumbering, including in that the getting out and handling of logs. I have been employed in that business during the time when I have lived in Stillwater. I have had personal experience in almost all branches of the business of logging. I know the general course of the business at Stillwater. The logs that come down the St. Croix are first gathered together and assorted
165 at the St. Croix Boom Corporation boom above Stillwater, I should think, about a mile and a half. It depends on the stage of water how far that is above the head of Lake St. Croix. The limits of the boom extend very near down to the limits of slack water. The lower end of their stringers are virtually at the head of the lake. The water is very slack. I can't tell you how many logs during all the years from 1888 to 1893 came through the St. Croix Boom Corporation's boom per annum on an average. The logs came from Wisconsin and Minnesota. They have every year since I have been there. When the logs are assorted there they are taken to the different rafting grounds and the saw-mill points.

The boom company at Stillwater does not raft the logs. These that are taken to the mill ponds are usually sawed by the manufacturers at Stillwater, and those that are taken to the rafting grounds are rafted into brails, as a general thing. Some of them are sold and go below; some of them are afterwards bought and sawed by the saw-mills. The majority of the rafted logs go below. The logs are rafted in brails, surrounded with boom sticks and with lines to hold them, arranged parallel with each other in the boom. The individual logs are not fastened together to any extent. After the logs come out of the St. Croix Boom Corporation's boom they are all measured by the surveyor general, and an account kept of the measurements of the different marks. Each log is scaled to its own mark. Some logs escape from the St. Croix Boom Corporation's boom that are not immediately delivered to the owner; they get away. The lake crew is supposed to pick up all these logs; they are kept on the lake for that purpose and they take the logs to the boom, where they are scaled again; they are scaled at the boom to the mark. These logs that are picked up in this way are called lake logs. They are taken around and given to the people who have log credits.

166 After these logs are picked up and scaled there are certain credits given to the owners. These logs are subject to the owner's demand. He takes the logs at a scale there or they are placed to his credit. They are sold and scaled out again to the

parties who have a credit or to some party who has an order on lake credit for these logs. They are scaled out again.

In assorting logs at the boom, logs of one owner get scattered with logs of another owner to a certain extent. When that happens the real owner gets his logs in this way, he gets credit when the logs are scaled from the board of trade. These logs are scaled; all scattering logs are scaled up and an account is kept with the board of trade. That account with the board of trade is allowed to run until fall. In the fall they have a general settlement. So many of my logs have gone to the board of trade and some of the board of trade logs have come to me, and whichever way the balance is the settlement is made. That is paid in money, at the price fixed by the board of trade. There is liable to be a change at any time and they have a monthly meeting. They go in there at the regular price as board of trade logs. For several years they have run at about one price, six, eight, nine, and nine and one-half dollars, according to the size of the logs, but that is liable to change at any time at a meeting of the board of trade. This board of trade is in substance an association of about all of the lumbermen engaged in doing business there. I don't know but all belong to it.

When logs are rafted and sent down the river, logs that belong to one owner do not always go to the same men below. They are liable to be sold to any one and delivered at the mills wherever they are located. The owners of logs are not always mill-
167 owners. Mill men frequently buy logs from different parties, so that different parties down the river who take the rafts and tow them down the river may buy the same mark of logs at different times all the year.

I have had personal experience in handling and driving large bodies of logs on the St. Croix and its tributaries. I know where Lake Pepin is and the size generally of the lake, and also of Lake St. Croix. Lake St. Croix is not a straight body of water from Stillwater to its mouth. The direction of it changes frequently. I am not so familiar with Lake Pepin as I am with Lake St. Croix. I have been there but very little.

The chances are very remote of a loose log—that is, one that is not fastened in a raft or a boom or somewhere nor being towed by boat or other propelling power—getting from Stillwater down through Lake St. Croix into the Mississippi river.

On cross-examination the witness testified:

The logs that get into Lake St. Croix—the loose logs which are scaled up again at the lake boom—are scaled so that each owner can get his logs and not lose them. They had been scaled by the St. Croix Boom Company for boomage perhaps three miles or three and a half miles above the lake boom.

I suppose this board of trade is a corporation and they act as a sort of clearing-house by which our exchanges are made.

The plaintiff then called SAMUEL MCCLURE in rebuttal, who testified as follows:

I live at Stillwater and have continuously for twelve years; most

of the time for thirty years. My business is logging and lumbering. I have been engaged in this business thirty to thirty-two years, in all branches. I was engaged in that business during the years 1888 to 1893, inclusive. I was interested in more than one firm or corporation which had logs coming down the river. Take
168 all of the logs that I was interested in coming down the river, there were from fifteen to twenty-two millions. The annual output there, on an average, was close to four hundred millions; from 375 to four hundred millions, some years as high as 452 millions, other years down to 350 millions odd.

The witness then testified with reference to the manner of doing business and handling and scaling logs at Stillwater, substantially as the witness Staples had done. He also testified that the logs are rafted in Lake St. Croix, from the head of the lake down for about six miles. The lake itself is twenty-nine miles long, so that
169 from the lower end of the rafting grounds it is twenty-three or twenty-four miles to the foot of the lake.

It is dead water all the way from the head of the lake to the foot, except that at Catfish bar, twelve miles down, and at the Hudson railroad bridge, six miles down, there is a perceptible current. At each of these places the channel narrow- up very much. It is only 130 feet at the upper end at the Hudson bridge. There is a bar across the river at the Hudson bridge and at Catfish bar, so that except in high water logs will not float anywhere except in the channel at these places. It is the bar at each place that narrows up the channel. At the Hudson bridge, where that bar comes out, the lake is between half a mile and three-quarters of a mile wide, and down at Catfish bar I should think it was nearly a mile. Lake St. Croix has several quite perceptible crooks in it.

Q. From what you know of the character of a saw-log and the handling of it, and from what you know of Lake St. Croix and Lake Pepin, I wish you would state what the chances would be or what the probabilities would be of a loose saw-log, not being in a raft or boom or any body of logs, getting, say, from the rafting grounds in Stillwater down through Lake St. Croix and through Lake Pepin.

A. They say there is nothing impossible, but I should think it very improbable of it ever getting there without help other than natural help.

The witness further testified:

I did not nor did any of the firms with which I was connected during the years from 1888 to the present time ever make any inquiry or search for any of our logs below Lake Pepin.

On cross-examination the witness testified:

These logs, which are made up for down-river points, are sometimes made up two logs deep. The logs are all loose inside
170 of the boom. One is laid crossways and the other makes a coupling or binder. The top tier is laid crosswise, which binds the two together. The booms that are put around outside are the size of one log. I don't think any of the rafts which I have sent out have been broken up at the bridge at Reed's landing. I

have known that that did happen, but not at the bridge, but above, between Lake City and the bridge.

Lake St. Croix is the last part of the St. Croix river and empties into the Mississippi river. The lake extends clear to the Mississippi river. The water of the St. Croix passes down and eventually reaches the Mississippi river.

Plaintiffs also called JAMES LANE, in rebuttal, who testified as follows:

I reside at Stillwater and have for 38 years. During that time my business has been working on the river and in the woods, in the logging business, and on the lake. During the summer season for some years past I have been employed by the St. Croix Boom Company taking care of what they call the lake logs. I have had charge of the crew that has been doing that work for fifteen years. Lake logs are logs that get away from the booms and from the rafting grounds. I pick them up and put them in what we call the lake boom—those and some that we called the scattered marks. I never found but very few logs further down than the Catfish bar. We go down as far as Kinnikinick and get a few scattering logs, but very few. Kinnikinick is about eight miles from the lower end of the lake. A little stream comes in there on the Wisconsin side. There are no pine logs come into the lake out of that stream. I have never been on Lake Pepin. In my judgment and from my experience, the chances would not be very good of any loose logs getting from the rafting grounds at Stillwater down through Lake St. Croix unless they were in a boom or raft towed down. We pick up below what we call the Hudson bridge, about twice a year, all the scattering logs; pick them in in the spring and in the fall. I only go down to Catfish bar about once a year, and below that about once in two years. In the course of each season I pick up from 300,000 to 500,000 in the entire lot out of the whole season's
171 run. You will find them strung along on both sides of the lake shore down as far as Catfish bar, but the majority of them on the Wisconsin side below Hudson bridge come in around that way and get up into Catfish bar, so that it is pretty hard for logs getting adrift at Hudson bridge to go down below Catfish bar. The majority of these logs are lying on the Wisconsin shore that I pick up. During the entire time that I have been carrying on this business I think the most logs I ever found below Catfish bar was about a hundred at any one time. I suppose in the fifteen years I have found five hundred logs; that would be about 40,000 feet.

Plaintiffs then called H. J. MCKUSICK in rebuttal, who testified as follows:

I live in Stillwater and have for about thirty-six years; am engaged in the logging business. I have been agent for Mr. William Sauntry and for Musser, Sauntry & Co. for twelve years. I was with Mr. Anderson when he was in business before he died and the Ann River Logging Company. During the years 1888 to 1893, inclusive, I was at work for William Sauntry and the Musser-Sauntry

Land, Logging and Manufacturing Company and the Ann River Logging Company. I should say on an average I handled eighty-five to ninety million feet for these companies for six years, perhaps one hundred million. I should say we handled over one-half the cut on St. Croix. Sixty per cent. to sixty-five per cent. of the logs I had charge of went below. Out of the seventy-five to eighty million each year that we handled about forty million were cut and brought down by Musser, Sauntry & Company. After these logs were sorted out and rafted in the way the witnesses have stated here they were not all taken down the river by the Musser-Sauntry
172 Company; none of them at all were taken down the river by the company. After being rafted they were sorted and rafted and scaled and they were delivered to the members of the firm comprising the Musser-Sauntry Company, and about two-thirds of the total amount was taken down to the mills in Iowa and Illinois of Weyerhaeuser & Denkman and Dimmock, Gould & Co., and some to the Musser Lumber Company of Muscatine. The balance was sold on a log scale and went to other points. Musser-Sauntry logs were all put together. They rafted with reference to their own logs. For instance, Musser & Sauntry would have half a dozen different marks; they were all rafted together, these half dozen marks; then when these different members of the company took away logs Weyerhaeuser would take some of the same marks that Dimmock, Gould & Company did. Musser-Sauntry logs were sold to different buyers, mostly down-river parties having mills located along the river. Mostly sold to saw-mills located on the Mississippi river in Iowa and Illinois and some in Missouri. That was generally true of all logs I handled there. I think it is generally true of all logs that are taken below.

GEORGE W. REED was called by the plaintiff in rebuttal and testified as follows:

I live at Fulton, Illinois. I have lived there all my life. I have been in the river business—master and pilot on a steamboat; have been following that profession sixteen years, running towboats. I have towed logs through Lake Pepin and Lake St. Croix since I commenced piloting more or less every year. I never towed any from St. Paul.

Lake Pepin is not a straight body of water having one general direction; there are quite a number of crooks in it. When
173 you come in at the head of the lake you run almost east, then you run off to the right again, and then you turn to the east again. You go probably twelve miles before you turn to the right. That brings you down to what is called Point no Point. I don't know how much you alter your course there. It makes quite a turn when you round the point. You are still out of sight of anything behind you. Well, you are running a little bit southeast. Then you turn back to the east again. There is no perceptible current in Lake Pepin—not that you would notice after you got in at the head. I have seen loose logs—logs not bound up in a raft or boom—in Lake Pepin or along the shores at the upper end. The

wind on Lake Pepin changes about every time you change your course; it seems like it when you are going through there. We always figure to go through on the windward side, to get out of the wind as much as possible. It seems whenever we go around a point or a creek the wind hits us just as hard as ever. It changes, I should think, from the direction of the bluffs there. If you stop pushing a raft of logs and let them drift in Lake Pepin, it would go anywhere in the direction of the wind; generally speaking, the way the wind is blowing; that is the way it would go. I don't think loose logs not being propelled or pushed or driven in any way would ever go in Lake Pepin from head to foot.

On cross-examination the witness testified:

I have not had so much experience with loose logs as I have with towing them and rafting them in the rafts. If loose logs are found below Lake Pepin, logs bearing the mark of the St. Paul Boom Company, I should say that — might have gotten out of rafts down there and broken up on the bridge, or possibly something of that kind.

174 I don't say that if a raft breaks up a short distance from the foot of Lake Pepin that the logs could not get out of the lake. If they were broken up at the mouth and the wind was in the proper direction, they would blow out if they did not blow to one side. I have seen the Chippewa logs sometimes come out of the mouth of the Chippewa and blow up, come upstream. If the wind was in the right direction, they would blow out again, I suppose.

I run the steamer Weyerhaeuser for Weyerhaeuser & Denkman—Mr. Frederick Weyerhaeuser. We have considerable wind going through Lake Pepin with our rafts sometimes. It hinders our headway. The winds are very bad on Lake Pepin in storms. I have seen rafts broken up there.

On redirect examination the witness testified:

When rafts break up in Lake Pepin we generally pick up the logs or hire some one to do it. I never have had any experience of that kind myself. All I know is what I have been told with regard to the picking up of them. I have not had any experience in picking them up there. I have been fortunate enough to get through without breaking. When logs blow up from the mouth of the Chippewa into Lake Pepin, if the wind is blowing towards the beach, it will beach them just as quick as they get to shore. If they go on shore, they will not go off without being rolled. When the water rises up the chances are they will go up further. They might if the wind was blowing that way, and they might not. I have never had any experience with the ice there; I don't know anything about it.

Albert F. Hollingshead was then called by the plaintiff in rebuttal and testified substantially as did the witness Reed.

175 Robert A. Cassidy was then called by the plaintiff in rebuttal and testified substantially as did the witness Reed.

SAMUEL MCCLURE was recalled by the plaintiffs in rebuttal, and testified that the proportion of the annual output of logs from the St. Croix that was sent down the river each year during the years 1888 to 1893 was about one-half the cut; rather less, if anything. I should say the total annual cut was more than 375 millions in those years. The average cut of lumber out of the St. Croix logs above Lake Pepin in these years would be about 200 millions.

The plaintiff then read in evidence the cross-examination of J. B. PHELPS, as contained in his deposition, which is as follows:

The logs that came down through the West Newton booms in 1893 were in charge of the Mississippi River Logging Company for booming and scaling. We turned them over to them and they handled them to suit themselves.

Some years we exchanged some of our logs sometimes. I don't know that we ever sold any of them outright until the last two or three years. We had exchanged some with Mr. Cable, as our mills were there close together. We had an understanding; he would sometimes want more than he could get, and we exchanged and took them back at the same price.

These particular brails of logs to which Mr. Clapp has called my attention I don't think I ever saw personally. I think we had a few logs from Minnesota in the year 1893. They were from the St. Croix waters and not otherwise. We did have some logs from the main Mississippi river. I don't remember if it was that year. Sometimes we towed them down the river. We did not have
176 any further correspondence with Mr. Weyerhaeuser or with the Mississippi River Logging Company that year in regard to scaling these logs. I was not interested in 1893 in the Chippewa River Logging Company or in the Mississippi River Logging Company.

On redirect examination the witness testified:

Our logs that were brought down the river from any point above the mouth of the Chippewa were run in rafts. The rafts above the mouth of the Chippewa were rafted at Stillwater or at St. Paul and then towed down by boats.

On recross-examination the witness testified:

Rafts coming down from above the Chippewa were broken up sometimes. I think I have heard of their breaking up. It becomes necessary then to gather the logs together and re-raft them. I don't think we ever had any broken up from the St. Croix river.

The plaintiffs then read in evidence a portion of the deposition of PEYTON S. DAVIDSON, which was not read in the case in chief, which was as follows:

The Davidson Lumber Company had been cutting a great portion of its logs from the Chippewa river prior to the season of 1892 and 1893. When these logs were cut and banked on the Chippewa river, ready for driving, they started for West Newton. La Crosse was their ultimate destination. After starting for West Newton they are sorted out and delivered to the Davidson Lumber Com-

pany or its agents. The purpose of the Davidson Lumber Company after they were sorted out at West Newton was to bring them to La Crosse and saw them. The Davidson Lumber Company
177 did not in the season of 1892 and 1893 cut any logs or procure any to be cut in the State of Minnesota anywhere, and it did not cut or procure any logs to be cut anywhere in Wisconsin that would come into the Mississippi river above the mouth of the Chippewa river. The Davidson Lumber Company cut all of its own logs on the land it owned for manufacture; during the time of cutting their own logs they would buy some lots of logs that went in as their own, meaning by that they bought them on the bank or in the woods, though our company made an agreement with the Mississippi River Logging Company in the spring of 1893 to scale our logs that might come through West Newton booms. All of our logs that came through that year were scaled by our scalers pursuant to that agreement.

On cross-examination the witness testified as follows:

This agreement for scaling was in writing to this extent: there was a letter written to our company from the Mississippi River Logging Company, signed, I think, by Mr. Weyerhaeuser, that they would scale our logs for a certain price and take care of them and hold us harmless from any damage. They would scale them and give us the logs with the scaling bill.

On redirect examination the witness testified:

I think we can find that letter.

On recross-examination the witness testified:

By stray logs I mean this: The loggers that have logs that come to the slough; they would come in mixed when they came to the slough, and in sorting out each man's lot of logs they lose some marks and do not all go to the proper place and they run out to some particular place where they bank them and they call them stray logs and are sometimes sorted out on the river. We may get them in the course of exchange. We would cut so many thousand feet of logs, and are allowed so many, which go to pay short-
178 age, which they would have. That shortage is made up out of stray logs. I don't think we bought any logs in Minnesota in 1893. I think not in prior years. I might have bought a few, but I have no recollection of buying any. These logs to which I refer came down the Mississippi river in 1893 to West Newton in charge of the Mississippi River Logging Company. They came down intermingled with a large number of other logs belonging to other parties, and I made an arrangement with one of the companies to sort them and scale them. I do not know as I am competent to tell you what the practice had been as to scaling prior to 1893. My knowledge is confined to Beef slough. Perhaps we had logs coming through West Newton in 1892. I do not recollect. I recollect about 1893 because our main channel was coming there in 1893. I do not recollect whether it was coming there in 1892. If West Newton works were in operation in 1892, we had logs coming through there. I have no recollection of any scaler in Minnesota ever scaling any of our logs, but

I would not state that definitely. Our logs had been scaled by a fellow named Smith, in Wisconsin, and if anybody of the other State scaled them, I do not recollect it. As far as scaling was concerned, to a great extent, I know nothing, except that they were all turned over by us to the Mississippi River Logging Company. I suppose they took charge of the logs and were to bring them down to West Newton and get them through the sorting works before they were delivered to us. There was a letter that they would take the logs and scale them and deliver them to us without any further cost or trouble. I do not understand that we gave up absolute charge of the logs at any time. We had a representative at the slough—a man who represented our interests there—Mr. Chapman. We exercised authority over the logs from the bank down to the boom. We had a man on the logs. My son
179 was one. Generally, from the time we commenced to log until we got through, we had some men on them.

I don't know as I can tell you every detail of what they did. They did what anybody did who had logs in the river; they made contracts for logs, contracts for putting in logs; look over the logs and see how they were running; see how they were put into the stream; if there was any great amount of logs back. I cannot tell everything. My son did that. I had also a man named Charles French on Chippewa river. He scaled on the banks of the Chippewa, where they were lying. I can't state just the number of years that the Mississippi River Logging Company did business for us in that manner, but we never made any agreement with them that they should take the logs and run them, except this year.

The first instance of that agreement was the letter from the Mississippi River Logging Company. I do not know anything about Mr. Mullen scaling. From the date of this letter, I think the arrangement was made along in February. I had no knowledge of Mullen's scaling there or when he was to commence; did not know that he was going to scale there that summer. I would not say I had heard anything about it, but I had nothing to do with that. I did not know anything about it. I knew nothing about when he was going to commence scaling. I did not have any notice from Weyerhaeuser or any of his men. I was not interested in the Mississippi River Logging Company or the Minnesota Boom Company. I was not a member of these so-called pools. Neither was our company. Mr. Weyerhaeuser was not interested in our company. I do not think I knew of Mullen's scaling at the West Newton booms in 1893 until after this attachment came on. I mean the attachment on the logs.

180 On redirect examination the witness further testified, being shown a paper marked Exhibit C:

This looks like the letter I testified we received from the Mississippi River Logging Company in 1893 in reference to scaling our logs. I can't say positively it is the identical instrument. As I remember the contents of the letter I received, that agrees with it.

The letter marked Exhibit C was then read and received in evi-

dence, and is exactly like the letter, Exhibit A, referred to by witness Phelps.

The plaintiff then offered in evidence the depositions of WILLIAM E. SAWYER, GEORGE H. RAY, and LUCIUS COLEMAN for the purpose of showing that the logs of the Sawyer & Austin Lumber Company, of which Mr. Sawyer was secretary, and the logs of the Gem City Saw Mill Company and the Hannibal Saw Mill Company, which were represented and controlled by the witness George H. Ray, and the logs of C. L. Coleman, that came through the West Newton booms in 1893, were cut upon the Chippewa river and destined, all of them, to be taken to the saw-mills of the Sawyer & Austin Lumber Company, at La Crosse, the Gem City Saw Mill Company, at Quincy, Illinois, the Hannibal Saw Mill Company, at Hannibal, Missouri, and the C. L. Coleman saw-mill, at La Crosse, Wisconsin; that each of those owners made an agreement with the Mississippi River Logging Company to scale all of their logs that might come through those booms in that year, by an agreement substantially similar to the agreement which has been testified to by Mr. Davidson and by several other witnesses; this testimony to be followed by testimony showing that the logs of those parties just named and of all other parties whose depositions have been excluded
181 by the court were substantially all of the logs that came through the West Newton boom in 1893.

The defendant- objected to the testimony so offered as immaterial and incompetent. The court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then read in evidence in rebuttal a portion of the deposition of JOHN PAUL, not read in the direct case, which is as follows:

The John Paul Lumber Company had logs coming through the West Newton booms in the year 1893. Some of these logs may have been purchased by that company. They were cut on the Chippewa river and its tributaries. When they were cut and banked ready for driving, they were to be taken down to the Mississippi river. They were to be taken by the Mississippi River Logging Company and sorted at the booms up there. There are two companies, one that drives the logs down to Eau Claire, and they are sorted there and some of the logs taken out, but not any of my logs are sorted there. They are run down to the works of the Mississippi River Logging Company and brailed and rafted there as I desire and scaled and delivered to me. Those works are what are known as the West Newton slough. After we get them sorted out into rafts and brailed as we desired, they were delivered to us. We took them from there to La Crosse; they delivered them to us there. We disposed of them, either taking them to La Crosse or disposing of them to be taken down the river.

Q. In and prior to the year 1893, what proportion of the logs that were sorted out and delivered to you at the sorting works were

sold by you and what proportion manufactured at your mills in La Crosse?

The defendant objected to the question as immaterial and incompetent.

The PLAINTIFF'S COUNSEL: We offer to prove by this depo-
182 sition that 90 % of the logs referred to in the question were manufactured by the John Paul Lumber Company at La Crosse.

The COURT: I do not know that I understand the point of your offer.

PLAINTIFF'S COUNSEL: The point is to show that when these logs were cut and put in the river they were destined to pass through this boom to La Crosse.

The court then sustained the objection to the question; to which ruling and order plaintiff duly excepted.

Our company made an arrangement with the Mississippi River Logging Company to scale our logs there that year. Our company was written to by Mr. Weyerhaeuser and we wrote him a letter, of which we have a copy in our letter book. I have here a copy of the letter we received from the Mississippi River Logging Company, or from Mr. Weyerhaeuser, in reference to this scaling. This entire agreement was made by way of letters.

On cross-examination the witness testified:

Mr. Weyerhaeuser did not urge me to begin this suit. I never had a word of conversation with him about bringing this suit.

In turning my logs over to his scalers to scale I told him that I would understand that his company would have to stand between me and any damage from any other surveyor. That was at the time we made the arrangement. I mean by the other surveyor Mr. Mullen. Under this arrangement with Mr. Weyerhaeuser, he or his company were to take our logs and pass them through the booms there, at West Newton, and sort them out from the other logs that came down the river. I do not remember whether we got logs from Minnesota in 1893. We probably cut some from the St. Croix, and those logs were cut with the intention of having them
183 brought down to La Crosse. I think I can tell exactly how many St. Croix logs we cut in 1893.

Under the arrangement between us and the Mississippi River Logging Company for bringing these logs down to West Newton and sorting them, the logs were run by the Mississippi River Logging Company, brailed and scaled, and delivered to me for so much a thousand. The arrangement for brailing and scaling was not made at the same time. It was a separate arrangement.

On redirect examination the witness testified:

If we got any logs on the St. Croix river we got some of them on the bank and bought some logs at Stillwater. I did both, and acquired whatever we acquired on the St. Croix in one of these three ways. These logs as they came down the St. Croix river were all sorted out and delivered to us or our agent on the St. Croix at or near Stillwater, and from there they were brought to La Crosse by

towboats and rafts. None of the logs that were cut by us from our own lands or bought on the banks of the St. Croix or its tributaries were intended to be run down into the West Newton booms.

On recross-examination the witness testified:

It sometimes happened that in bringing a raft down from Stillwater the rafts were broken up. I presume it did not happen in 1893. I know from the amount of logs we received at La Crosse. We count every raft we get. We get the scale bill in advance. I can't recollect that there was a single raft broken up. We never had one broken up from the St. Croix. We have had some broken up from the slough; never had any broken above the slough.

Plaintiff then read in evidence in rebuttal the deposition of JOHN JAY PAUL, who testified as follows:

I am twenty-eight years old. I am the son of Mr. John Paul; am secretary and treasurer of the John Paul Lumber Company; have held that office since October, 1896. I have been connected with the company since the summer of 1892. I know the
184 John Paul Lumber Company received a letter signed by Mr. Frederick Weyerhaeuser in reference to the scaling of the John Paul Lumber Company's logs at West Newton boom in the summer of 1893. That letter is not now in the possession of our company. I do not know where it is. I know to whom it was given. It was handed to Mr. Thomas Simpson. That letter was answered by the John Paul Lumber Company by another letter written in answer to it. I cannot say whether the John Paul Lumber Company received another letter from Mr. Wyerhaeuser or the Mississippi River Logging Company in answer to that letter. I have a copy of the letter which I refer to as having been received by our company from Mr. Wyerhaeuser.

(Witness produces copy.)

I did not make this copy myself. It was made by a stenographer. I was present and helped compare it with the original. I read one copy and R. H. Paul the other.

The paper was then marked Exhibit F, and was offered and received in evidence, and is precisely similar to the letters identified by Mr. Phelps and Mr. P. S. Davidson.

Plaintiff then called Mr. FREDERICK WEYERHAUESER in rebuttal, who testified as follows:

I reside in St. Paul, and have for five or six years. Previous to that time I resided at Rock Island, Illinois, thirty-five years. I came to Rock Island in 1856, and have been engaged in logging and lumbering nearly forty years, pretty near all the time since I came to Rock Island. I commenced logging on the Chippewa river in 1868 or 1869. Before that time I had general knowledge of the business on the river above there, where the logs come from. I bought more or less logs above the Chippewa at the begin-
185 ning. During that time since I have been engaged in that business there have not been any pine logs which have come

into the Mississippi river from the banks where they were cut above the Chippewa without having been first sorted and put into rafts, except a few logs that came out of Willow river some twenty years ago, and which were rafted at Hudson. There have not been during the time that I have been in business any pine logs coming out of any of the tributaries of the Mississippi river between Minneapolis or the falls of St. Anthony and the Chippewa river except such as have come out of the St. Croix river.

I have carried on business on the St. Croix river, either personally or through companies in which I am interested, ever since 1868 or 1869. I am president of the Mississippi River Logging Company, and have been about twenty-four years; am also president of the Chippewa Logging Company; have been its president since we organized, in 1881.

Q. When the Mississippi River Logging Company was organized who were the members of it?

Objected to as immaterial.

The plaintiff then offered to show by this witness that the members of the Mississippi River Logging Company, some eight or ten of them in all, were all lumbermen or manufacturers of lumber, residing or having their places of business in the State of Iowa, Illinois, and Minnesota, and that the purpose, and sole purpose, of the organization was to facilitate and render less complicated the driving and handling of their logs after they were put into the Chippewa river, and perhaps the Black river, and that the general course of business of that company has always been substantially that all of the logs that were cut by or for the company were run down the Chippewa river first to Beef slough and afterwards to West Newton slough when the work was moved over there; that the logs belong-
186 ing to the company were all sorted and put in one place under one head, although there were a great many different marks, and that as fast as those logs were sorted out they were divided among the members and taken away by them to their several places of manufacture, according to the interest of each of the members in the company, which interest was determined by the amount contributed by each of the members in any one year to the fund of the company, which was used in acquiring the logs which it did acquire, and that the logs of the Mississippi River Logging Company and of the Chippewa Logging Company below Eau Claire constituted at least two-thirds of all the logs that came down that river in every year, including the year 1893.

The defendant objected to the evidence so offered as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Q. During the year 1893 and years prior to that time as far back as 1889, you may state whether or not all of the logs that came out of the Chippewa river into the West Newton booms, outside of the logs that were owned by the Chippewa Logging Company and the Mississippi River Logging Company, came there under any agree-

ment or arrangement with the several owners; and, if so, what the agreement was.

The defendant objected to the question as immaterial and because the agreement has been shown already.

Counsel for plaintiff stated that the agreement, as far as the cases of Lindsay & Phelps Company, John Paul Lumber Company, and Davidson Lumber Company, has been shown, and I am not asking to show that over again. The proposition is to show that the Mississippi River Logging Company and the Chippewa Logging Company put their logs in there, and also to show that the other owners of logs, of logs that came in there, agreed with these people
187 that they should take them and put them through their booms, sort them, scale them, and deliver them to them rafted.

COUNSEL FOR DEFENDANT: A number of depositions have been offered here for the purpose of proving this matter and they have been excluded thus far as being immaterial.

COUNSEL FOR PLAINTIFF: That is true, and that is the reason I make the offer by this witness, because these depositions do not cover all of the logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by this witness that all of the logs that came down the Chippewa river and did not belong to the Mississippi River Logging Company or to the Chippewa Logging Company were turned over to the Mississippi River Logging Company; that there was an agreement by which the company was to drive the logs down the Chippewa boom and assort them and raft them and deliver them, rafted, to their respective owners at the foot of the West Newton boom.

The defendant objected to the testimony so offered as incompetent and immaterial. The objection was sustained by the court; to which ruling and order plaintiff duly excepted.

On cross-examination the witness testified:

I was president of the Minnesota Boom Company in 1893. I never had any stock. I think I had been its president perhaps from its organization. I am not sure about that. I spent a good deal of time on the Chippewa, but not a great deal at West Newton. I never personally made any examination as to what logs came into the Mississippi river between St. Anthony falls and the Chippewa. I had an estimate of the amount that goes in there. I had to see what went through the booms before I could pay them. I
188 only know what went into the booms by what somebody told me.

On redirect examination the witness testified:

It is not true that all I know about whether logs that came into the Mississippi river or any of its tributaries above the Chippewa, except the St. Croix, is what I have learned from an examination of my books. I personally know that logs never came from any-

where except a few that came in out of Willow river twenty years ago, and that is a tributary of the St. Croix.

I have obtained that knowledge by driving up and down the river and buying logs of these people, and driving through the pineries, and knowing where the pine timber is situated, and I do know where the pine timber is situated in both States.

The plaintiffs then called JOHN H. MULLEN, one of the defendants, in rebuttal, and stated that they proposed to examine him, under the provisions of the statutes of Minnesota, as an adverse party.

Q. When you commenced scaling logs at West Newton, or your deputies did, in the spring of 1893, you did not have any record in your office of log marks, did you?

The defendants object to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by this witness that he did not have in his office, either at the time he commenced scaling or at any other time in 1893, any record of log marks which had been made in pursuance to the provisions of the statutes of this State.

The defendants objected to the introduction of such evidence as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

189 I have in my office a record of these two scale bills which were offered in evidence and which were marked "Defendants' Exhibits 3 and 4." Such records as I have are here. I think the book which I am now shown, and which is marked on back "Bill book, surveyor general's office, 4th District, M," contains the only record of the May bill in the book; there is an office copy, I think, in addition to that, which is substantially the same, I suppose—exactly the same, as far as I know. I mean a pen and ink or pencil copy. I suppose it to be the same. Of course, I have not personally compared it. I don't know whether that is the only record that I know of in my office of this bill which is recorded in any book. About this time I was taken sick and was out of the office a good deal. I know that there were no books when I took the office. I had a set of books made substantially the same, and purport to be substantially the same as in Minneapolis, and this book was differently arranged from what I intended, and I had another book that I intended to make a continuous record of these bills in. I don't know that they were ever recorded in it; I was taken ill about that time; I don't know where the book is; during my sickness the books were removed from the office. I have searched for it, but I don't know that it was ever made up complete; I don't know that it was. I am unable to find in my office any other record of that scale bill than this one and another copy which is on pieces of paper connected the same as the scale bills, with fasteners.

Plaintiff then offered in evidence pages 237 to 261, inclusive, of the book referred to by the witness for the purpose of showing that the first bill which has been offered in evidence and marked

Exhibit 4 has never been recorded in the office of the witness, and the same was received in evidence, and a copy of the first and last page thereof is hereto attached and marked "Exhibit N." The other pages are similar, differing only as to marks and number of feet.

190 The witness further testified: I am not sure that there is any book in my office in which the second bill which has been offered in evidence and marked Exhibit 3, which is the June bill, has ever been recorded, except a letter-press copy of the original bill. The book which is now shown me is the one I refer to, I think. I saw none that I am sure of. I do not mean by that that there might have been some record made there or some book that I don't know anything about, except in this way: When this book which I had here a few moments ago, the first one, came, I made up my mind it was not just the kind of a record I wanted for this continuous work and I got another book intended for that work. While we were getting out the June bill letter-press copies were taken of that bill at that time. I was sick and but little of the time in the office. If I had been asked if there was another book before I looked, I should have said yes. I supposed there was, but I have been unable to find it and so concluded that there was no other record kept. The books were taken out of my office at the time of the commencement of this suit. I don't know by whom. The office room that I had used in the building I had used for an office was given up by me. They may have been removed by Mr. Cronk, who is here; possibly by the owner of the building. I had nothing personally to do with moving them. I think I was in bed with a leg sawed off at that time. All of the records of my office, so far as I know, have been for the past year in an office occupied by me at Wabasha up to the time that they were sent up to the attorney general's at his request. I think that was some time along during the past winter. Up to that time they had been in my possession and under my control all of the time. When I got able to be about I found them in my office at Wabasha.

The letter-press impression referred to by witness was then marked Exhibit D, and the plaintiff offered in evidence all that part of the book which precedes the letter-press copy of the certificate which is attached to Exhibit 4, stating that witness
191 scaled these logs, and claims a lien upon them for a certain amount, for the purpose of showing that no record was ever made of Defendants' Exhibit 4—that is, that part of it that constitutes the scale bill; and the same was received in evidence and is hereto attached. No other evidence of any record of either of the scale bills, Exhibit 3 and 4, was given or offered by either party.

The witness further testified:

I did not myself keep these books—not as a whole. I did some of the work of making up these Exhibits 3 and 4—that is, I made the June bills. I think I can tell if my attention is called to a particular mark of logs which appear from this scale bill to have been scaled in any one day, where the original tally-sheet is.

The witness was then excused, and the plaintiffs recalled E. E. SINCLAIR in rebuttal, who further testified as follows:

I have in my possession, in the office of the surveyor general, all the records of log marks in the second district. I have examined these records for the purpose of ascertaining whether any marks which are shown upon the sheet of paper which is now handed me, marked Exhibit E, are recorded in that office.

The one opposite which I have placed a check-mark is recorded; none of the others. There is nothing exactly like the other mark; it is similar, though. There is one that would be taken for that mark on a log. The one I have indicated is not exactly like the one I have on record; this has two notches. We have what is called girdles; they are longer than a notch, but it might be mistaken and called the same—one might be mistaken for the other.

Exhibit E was then offered and received in evidence, and a copy thereof is hereto attached and marked Exhibit E.

JOHN H. MULLEN was then recalled and further testified
192 as follows:

Q. I call your attention to Defendants' Exhibit 4, under date of May 17th, and to the mark A B L, which is the second mark on that sheet. Tell me what tally-sheets of brails of logs those marks were contained in, or tell me what tally-sheets they were contained in, if you can.

A. The tally-sheets of that date; I cannot give you the number of the tally-sheets from any record of it; the tally-sheets that are made up every day. The days' works were put together and dated, and there is no doubt but that the tally-sheets of that date will show that mark. They must do it, because that is where it comes from. I can't tell from memory, of course. The only answer I can give you is that it will be found among the tally-sheets of that date. The tally-sheets were made up from the number of the brails, and the bill gives the brail numbers and the stamp, and gives the date. Each tally-sheet shows the number of the brails that it was made from. I don't know how the tally-sheets are filed in my office, whether by the date or the number of the brail. I think Mr. Cronk knows.

CHARLES W. CRONK was then called by the plaintiffs in rebuttal and testified as follows:

I reside at St. Paul. I was employed by Mr. Mullen during the summer of 1893. In the first place, I was in the office in a general way, adding up sheets and correcting sheets. About the 20th of June I took charge of his office. I did not make the scale bill, Exhibit 4, or the May scale bill. I did not have anything to do at that time with making out the scale bill and getting the marks of the logs put down there. I was simply helping Mr. Johnson, who had charge at the time. I can tell so you can find out where
193 the tally-sheets of brails of logs which are shown on this sheet and marked A B L, 695 logs and 195,700 feet, are contained. If you get the tally-sheets at that date, you will find the

mark on the tally-sheet. They were put there together in a gathering sheet. The gathering sheet does not show the number of the brail. It shows the log mark and number of feet and the number of logs. It shows the date, I think. The tally-sheets are filed by the date and by the number of the brails. They are filed by order of number, so in order to find out these tally-sheets it would be necessary to examine all of the tally-sheets that are in the office. That would be the only way you would be certain, by examining the tally-sheets in the office; that is the only way you can get at it.

HUGH STEWART was then recalled by the plaintiff, and testified in rebuttal as follows:

I was employed all the time that the assorting and booming of logs was carried on at West Newton in the office, in charge of the log books, and before that time I was employed on the other side of the river in the same capacity. My duties required me to become familiar with all of the marks that came through these booms in different years, and I am familiar with them.

The witness was then shown the paper marked Plaintiff's Exhibit F, a copy of which is hereto attached, and he testified:

I made out that paper. I got these dates and marks and the number of logs and the number of feet out of the May and June scale bills of the surveyor general—that is, Defendants' Exhibits 3 and 4 here. In the performance of my duties I saw every year all of the marks of the logs that were turned into the office by the various scalers.

Q. Did you ever see any of the marks that are on this
194 Exhibit F?

The defendant objected to the question as immaterial and incompetent.

The COURT: What is the object of the testimony?

PLAINTIFF'S COUNSEL: The purpose of the testimony is to show by this witness and others that these scale bills so far as they relate to these logs, which amount to a million feet, are not only incorrect, but they represent logs that did not go in there at all. There is no such mark of logs going through there.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiffs then offered to show by the witness that during all the time which he has been employed in the office of the West Newton booms he never saw any of the log marks set forth in Plaintiff's Exhibit F; this testimony to be followed by the evidence of the scalers for the Chippewa Logging Company that the logs were not in fact in the brails of logs in which they may appear to be by the tally-sheets in the surveyor general's office, and by the evidence of the men who had charge of the catch-marking of the logs, showing that these marks were marks that were not known at those booms, and that it was the duty of more than thirty men, if any such marks came to him, to tie it up with a line and hold it until his attention was called to it to give directions where it should go.

The defendant objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which order and ruling plaintiff duly excepted.

Q. It appears from the tally-sheets offered in evidence in this case that there was in brail No. 1637 one log marked Z M Z. You will state whether or not that log was a stray log, as has been defined by Mr. Douglas here.

195 A. It was. That log and other stray logs like it was accounted for to the real owners as follows:

The log is posted to the mark; the owner gets credit for it that way. It is entered up to his credit in the fall and a statement sent to him, and a settlement made if the balance is in his favor or against him.

Q. Is there or has there been any attempt made on the part of owners of these stray logs to follow the logs themselves and take them out of the brails where they happen to be?

The defendants objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then called HENRY PHITTS, who testified as follows:

I live in St. Paul; I am working for the St. Paul Boom Company. I was working at the West Newton boom in the summer of 1893, looking after the sorting, looking after the sorters. I used to look after the logs and see that they marked them right and that they went into the right places. I had to tell the men engaged in the catch-marking what to put on them and what bark marks to put on. I gave the same instructions to the men that were stationed at the various gaps to look all the logs over and see that they were properly sorted.

There must be upwards of thirty different men stationed at these gaps to perform the same duties. If a log came to one of these sorters with a mark on it that we have not given here and one that he is not familiar with he tied it up until I came along. I was there during the entire season performing the same duties all the time, and I had performed these duties before that. I could

196 not tell you how many years I started before 1889. I had been performing those duties ever since the starting of the boom at West Newton, with the exception of the first year.

Q. I show you Plaintiff's Exhibit F and ask you to look at the marks upon that exhibit and see whether you ever saw any of them before.

Defendant objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness that he never saw any of the marks on this Exhibit F, and that it would be impossible for the number of logs which is said to have been marked with these marks, which number exceeds a hundred, to have passed through this boom on any one day (as it appears from these scale bills offered in evidence that they did do) without the attention of

this witness being called to it, and that they did not in fact pass through there.

Defendant- objected to the question as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then called JAMES C. DALY in rebuttal, who testified as follows:

I reside in Bayfield county and have for two years. Prior to that I resided at Eau Claire, Wisconsin. At present I am a police officer and deputy sheriff of that county. I have done work in scaling logs for about twenty years. I worked down at the booms above the West Newton slough in the summer of 1893. I was employed by the defendant Mullen. My contract was to have charge, manager, and overseer of the scaling of the logs. I had the general charge and oversight over the deputies who did the scaling—that is,
197 I did the scaling on the outside and paid no attention to the office.

Q. Were the men who were employed under your supervision there men who had ever worked at scaling logs at West Newton or Beef slough?

The defendant- objected to the question as immaterial.

The COURT: How is that material?

PLAINTIFF'S COUNSEL: I think it will become material by showing that they were not, with some few exceptions, and we expect to show that it is impossible for a man who was not familiar with that work and with the marks there to make a correct scale of logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness that there were over thirty scalers employed by the defendant to do the scaling at West Newton during the summer of 1893 and half as many tallymen, and that all the tallymen, with the exception of six, and all of the scalers were men who were inexperienced and had never had any experience in scaling logs at the West Newton booms, and that by reason of the great number of marks that are rafted together for the Chippewa Logging Company and the Mississippi River Logging Company it is impossible for an inexperienced scaler with an inexperienced tallyman to make any correct scale and return of the logs and the marks thereon, and that, as a matter of fact, the scales or pretended scales made there by the surveyor general's deputies were grossly inaccurate.

The defendant- objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The witness then further testified:

I have scaled there for a number of years. I also scaled the same class of logs on the other side of the river, at Beef slough.
198 I scaled a number of years on the other side, and one year at Beef slough, so I am familiar with the method of doing the work and the class of work to be done.

The plaintiff then renewed the offer above set forth, and the defendants again objected to the testimony so offered, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then called F. B. YATES in rebuttal, who testified:

I live at Stillwater. I am a deputy of the surveyor general there; have occupied that position ten years; have in my possession all the records of that office at Stillwater. I recently made an examination of the records of the log marks in that office.

The witness was then shown a paper marked Plaintiff's Exhibit G, and testified:

I have made an examination of these records for the purpose of ascertaining whether any of the log marks on that exhibit is recorded in that office. I find only two marks of the marks shown on that exhibit recorded there since 1885. My examination does not go further back than that, and the two marks I find recorded I have placed a memorandum about them on the sheet itself.

The plaintiff then offered in evidence Exhibit G, which was received, and a copy thereof is hereto attached.

Plaintiff then offered in evidence two papers marked respectively Exhibit H and Exhibit I. The same *was* received in evidence, and copies thereof are hereto attached, marked respectively Exhibits H and I.

JOHN H. MULLEN was then recalled and cross-examined by counsel for defendant-, and testified as follows:

199 I did not turn over the records of my office to my successor. I have always retained them as far as I could in my possession until they made an application for them and called upon me for them.

Counsel for the plaintiff then stated:

It has been suggested that your honor could not have understood that the various marks of logs with the number of logs and number of feet that are set down on Plaintiff's Exhibit F, to which I called the attention of our witnesses, were taken from the scale bills which were offered in evidence by the defendant. I supposed that was made clear to the court.

The COURT: Yes; I do so understand it.

The plaintiff then called COLIN MCMILLAN in rebuttal, who testified as follows:

I live at Chippewa Falls and have for seventeen years. I was one of the deputies of the surveyor general, Mr. Mullen, who did the scaling in the summer of 1893 for that office. I had charge of the men who were doing that work part of the time. The crew that I had charge of was scaling what we understood to be outside logs that did not belong to the company. I scaled some of the logs myself, and had general supervision of the other men.

Q. State whether any of the men under you in scaling these logs scaled all logs twenty-four feet and over in length as two logs.

The defendant- objected to the question as immaterial and in-

competent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then recalled HUGH STEWART and asked the following question:

200 Have you made a computation for the purpose of being able to testify what proportion of the logs that came through the West Newton boom in the summer of 1893 and the years prior thereto belonged to parties who resided outside of either the State of Minnesota or Wisconsin?

The defendant- objected as immaterial.

The COURT: How is that material?

PLAINTIFF'S COUNSEL: It is material as tending to show the character of the business carried on there—that it was purely and entirely interstate commerce.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Q. Have you made a computation so that you can testify as to the amount of logs that were rafted and scaled through the West Newton boom in the summer of 1893 that were not claimed by anybody and that you had no means of knowing to whom they did belong?

The defendant- objected to the question as immaterial.

The court asked: How is that material?

Plaintiff's counsel stated: It is material in this way: We expect to show by this witness that out of 500,000,000 feet of logs that came through that summer that all of the logs except 120,000 belonged to parties that were engaged in logging on the Chippewa river.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Q. I think you have already testified that what are known as pick-up logs are logs that are picked up along the river below the West Newton booms?

A. Yes, sir.

Q. Can you tell how many logs other than those that were recognized as belonging to parties engaged in logging on the Chippewa river were picked up and scaled by the Mississippi River

201 Logging Company between these West Newton booms and La Crosse during the summer of 1893?

The defendant- objected to this question as immaterial.

The plaintiff's counsel stated: We think it is material upon this proposition. We have claimed and shall claim that substantially all logs, if not quite all of them (the amount is impossible to determine), that go into the West Newton booms that do not come from the Chippewa river are logs that escape from rafts while passing down the river from Lake Pepin to the upper limits of the West Newton boom, and this testimony is offered for the purpose of substantiating that claim, by showing that the proportion of that class of logs that are found below West Newton is larger, in about the

same proportion, with those that come into or are rafted out of those booms, and that the difference between these two amounts is substantially like the difference between the mileage of the river from Lake Pepin to the West Newton booms and from the West Newton booms to La Crosse. This testimony is offered for that purpose.

The court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiffs then rested their case in rebuttal.

The defendants then offered in evidence two pages of the book which had been marked Plaintiff's Exhibit D, and which were marked A and B.

The plaintiff objected to these two pages as immaterial and incompetent, because there is nothing in these two sheets which are offered in evidence which the law authorizes or requires the surveyor general to record, and the original papers have already
202 been offered in evidence and are attached to Defendants' Exhibit 3; also for the reason that they form no part of the scale bills; also for the reason that there is no provision for recording such a paper, and the paper now offered in evidence is not in any sense a record.

But the court overruled the objection and received the papers in evidence, and copies of the same are hereto attached and marked, respectively, A 1 and B 1; to which ruling and order plaintiff then and there duly excepted.

No further evidence was offered by defendants.

Thereupon it was stipulated in open court, by and between counsel for the respective parties, that such of the private and local laws or special laws of the State or Territory of Minnesota as either party might desire to call the attention of the court to should be considered in evidence and might be read to the court and commented upon with the same force and effect as if formally offered in evidence and made a part of the record.

Counsel for the plaintiff called the attention of the court to the following special laws of the State of Minnesota:

The charter of the Mississippi Boom Company, which is chapter 18 of the Compilation of the Laws of 1851–1854.

Charter of the St. Croix Boom Company, which is chapter 29 of the Private Laws of 1851.

Charter of the St. Anthony Boom Company, which is chapter 51 of the Laws of 1852.

Charter of the St. Croix Boom Corporation, which is chapter 141 of the Laws of 1856.

Charter of the Mississippi & Rum River Boom Company, which is chapter 56 of the Laws of 1857.

Thereupon the plaintiff requested the court to make cer-
203 tain declarations of the law, as follows:

First. That it has not been shown that the logs for which defendant- claims fees for scaling in this case ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed or to any lien on the plaintiff's logs therefor.

But the court refused to make such declaration; to which ruling and order the plaintiff then and there duly excepted.

Second. That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

a. Because the scale bills, Defendants' Exhibits 3 and 4, are not evidence of the scaling of the logs therein described.

b. Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district.

c. Because it appears that a very great proportion of the logs mentioned in these scale bills, Defendants' Exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else.

d. Because the pretended records of said scale bills were not in fact any record whatever.

e. Because it does not appear that any of the log marks shown on defendants' scale bills, Exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the 4th lumber district of the State of Minnesota, in accordance with the provisions of title 3, of chapter 32, General Statutes of the State of Minnesota.

But the court refused to make such declaration; to which ruling and order the plaintiff duly excepted.

Third. That the statute under which the defendants claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the State of interstate commerce and is unconstitutional and void, being in contravention of subdivision 4, of section 8, of article 1, of the Constitution of the United States.

204 But the court refused to make such declaration; to which ruling the plaintiff then and there duly excepted.

And because the matters above set forth do not appear of record in this cause the plaintiff prays that the foregoing bill of exceptions may be allowed and settled.

THOMAS SIMPSON,
CLAPP & MACARTNEY,
Plaintiff's Attorneys.

The above and foregoing bill of exceptions is correct and we consent that it may be settled.

Dated Dec. 21, 1897.

THOMAS SIMPSON,
CLAPP & MACARTNEY,
Plaintiff's Attorneys.
H. W. CHILDS,
WARNER, RICHARDSON & LAWRENCE,
Att'ys for Defendants.

The above and foregoing bill of exceptions and the exhibits thereto attached and therein referred to having been examined by me and found to conform to the truth, and the parties having agreed thereto, the same is now signed and settled by me as and for the bill of exceptions in said cause.

Dated Dec. 22, A. D. 1897.

WM. LOCHREN,
District Judge.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

206 DEFENDANTS' EXHIBIT 1.

Articles of Incorporation of the Minnesota Boom Company.

For the purpose of organizing a corporation under the laws of the State of Minnesota, we the undersigned, do hereby associate ourselves as a corporation and adopt the following articles of incorporation.

Article 1.

The name of this corporation shall be the "Minnesota Boom Company." The general nature of the corporate business shall be the construction, maintenance and use of booms, dams, and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi river, or either bank thereof, between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona, meets the Mississippi river or a point opposite thereto, and also upon, or on any side or bank of, any slough, bayou, branch or part of the Mississippi river between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation beside the construction, maintenance and operation of said structures shall be gathering, driving, booming, storing, assorting, rafting, brailing, and otherwise handling any and all logs, lumber and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber or timber upon any of said waters or within said territory, and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with those logs, lumber or timber—any work or services *are* done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid.

207 The principal place of business of the corporation shall be the city of Winona, Winona county, Minnesota.

Article II.

The time of commencement of this corporation shall be April 16th, 1889, and it shall continue thirty years.

Article III.

The amount of the capital stock of this corporation shall be one hundred thousand dollars ($100,000) and it shall be paid in at the time and in the amounts and manner prescribed by the board of directors. Such capital stock shall be divided into one thousand shares of one hundred dollars ($100) each.

Article IV.

The highest amount of indebtedness or liability to which said corporation shall at any time be subject is fifty thousand dollars ($50,000).

Article V.

The names of the persons forming this corporation are: William H. Laird, A. F. Hodgins, A. B. Youmans, James L. Norton, Andrew Hamilton and William Hayes. All of said corporators reside at the city of Winona, Minnesota.

Article VI.

The government of said corporation and the management of its affairs shall be vested in a board of five directors, who shall be stockholders, and the corporate officers shall be a president, vice-president, secretary and treasurer, who shall be elected by the directors from their number. Said directors and officers shall hold their offices for one year and until their successors are elected and qualify. The board of directors shall have authority to adopt suitable by-laws for the government of the corporation. The annual meeting of the stockholders of this corporation shall be held on the fourth Tuesday of May in each year and at this meeting the directors shall be elected. At their first meeting after such annual meeting of
208 stockholders, the directors shall annually elect the corporate officers.

The first directors of the corporation shall be William H. Laird, A. F. Hodgins, A. B. Youmans, James L. Norton and William Hayes. The first officers shall be: William H. Laird, president, A. B. Youmans, vice-president, William Hayes, secretary, and A. F. Hodgins, treasurer. These first officers and directors shall hold office until the annual meeting of stockholders in May, 1889, and until their successors are elected and qualify.

In witness whereof, we have hereunto set our hands and seals at the city of Winona, Minnesota, on this 5th day of April, 1889.

WM. H. LAIRD. [SEAL.]
A. F. HODGINS. [SEAL.]
A. B. YOUMANS. [SEAL.]
JAMES L. NORTON. [SEAL.]
ANDREW HAMILTON. [SEAL.]
WM. HAYES. [SEAL.]

Signed, sealed and delivered in presence of—
LLOYD W. BOWERS.
B. F. HOUSTON, JR.

STATE OF MINNESOTA, } ss:
County of Winona, }

On this 5th day of April, 1889, before me personally came William H. Laird, A. F. Hodgins, A. B. Youmans, James L. Norton, Andrew Hamilton, and William Hayes, to me personally known and known to be the persons described in and who executed the foregoing instrument, and they then and there severally acknowledged that they executed said instrument as their free act and deed.

B. F. HOUSTON, JR.,
[NOTARIAL SEAL.] *Notary Public, Winona County, Minnesota.*

Filed in this office for record April 6th, A. D. 1889, at 12 o'clock m.
H. MATTSON,
Secretary of State.

STATE OF MINNESOTA, }
Department of State. }

209 I, Albert Berg, secretary of state of the State of Minnesota, do hereby certify that I have compared the annexed copy with record of the original instrument in my office of articles of incorporation of the "Minnesota Boom Company" as filed April 6th, 1889, and recorded in Book "W" of Incorporations, page 447, and that said copy is a true and correct transcript of said record, of said original, and of the whole thereof.

The Great Seal of the State of Minnesota.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol, in St. Paul, this 10th day of August, A. D. eighteen hundred and ninety-seven.

ALBERT BERG,
Secretary of State.

210 DEFENDANTS' EXHIBIT 2.

THE STATE OF MINNESOTA, EXECUTIVE DEPARTMENT.

Knute Nelson, governor of said State, to John H. Mullen, of Wabasha county, sends greeting:

Reposing especial trust and confidence in your prudence, integrity, and ability, I have appointed you, the said John H. Mullen, as surveyor general of logs and lumber for the fourth lumber district for the full term of two years. You are therefore by these presents appointed and commissioned surveyor general of logs and lumber, as aforesaid, to have and to hold the said office of surveyor general of logs and lumber, together with all the rights, powers, and emoluments to the said office belonging or by law in anywise appertaining, until this commission shall be by me or other lawful authority superseded or annulled or expire by force or reason of any law of this State.

In testimony whereof I have hereunto set my name and caused the great seal of the State of Minnesota to be affixed at the capitol, in the city of St. Paul, this twelfth day of April, in the year of our Lord one thousand eight hundred and ninety-three, and of the State the thirty-fifth.

KNUTE NELSON.

By the governor:
F. P. BROWN,
Secretary of State.

[Great Seal of Minnesota.]

211 A. J. Allison, county auditor, Wabasha county.

WABASHA, MINN., *Aug. 10th*, 1897.

I, A. J. Allis*t*on, county auditor of Wabasha county, State of Minnesota, do hereby certify that the attached bond of J. H. Mullen

and oath is a correct copy as filed in my office the 17th day of April, 1893.

A. J. ALLISON,
County Auditor, Wabasha County.

[Seal of County Auditor.]

212 STATE OF MINNESOTA, } ss:
County of Wabasha, }

I, John H. Mullen, of the city and county of Wabasha, State aforesaid, do solemnly swear that I will faithfully discharge the duties of surveyor general of logs and lumber for the fourth district of Minnesota, to which I have been appointed, to the best of my ability and in accordance with law, so help me God.

JOHN H. MULLEN.

Subscribed and sworn to before me this 17th day of April, 1893.

L. WHITMORE,
[NOTARIAL SEAL.] *Notary Public, Wabasha Co., Minn'a.*

Know all men by these presents that we, John H. Mullen, as principal, and C. C. Hirschy, L. Whitmore, Jacob Tenney, Alice G. Lawrence, Samuel Hirschy, Malcolm Kennedy, as sureties, all of the city and county of Wabasha, State of Minnesota, are held and firmly bound unto the Board of County Commissioners of the County of Wabasha, State of Minnesota, in the sum of five thousand dollars, lawful money of the United States; to the payment of which to the said Board of County Commissioners, their successors or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

Whereas the said John H. Mullen, the principal, was, on the 12th day of April, A. D. 1893, appointed surveyor general of logs and lumber for the fourth lumber district of Minnesota and duly confirmed as such:

Now, therefore, the conditions of this obligation are such that if the said John H. Mullen shall faithfully discharge his duties as such surveyor general and deliver over to his successor all bills, bonds, certificates, and papers, and other effects pertaining to said office, then and in that case this obligation shall be null and void; otherwise to remain in full force and virtue.

213 In witness whereof we have hereunto set our hands and seals this seventeenth day of April, A. D. 1893.

JOHN H. MULLEN.	[SEAL.]
C. C. HIRSCHY.	[SEAL.]
JACOB TENNEY.	[SEAL.]
L. WHITMORE.	[SEAL.]
ALICE G. LAWRENCE.	[SEAL.]
SAMUEL HIRSCHY.	[SEAL.]
MALCOLM KENNEDY.	[SEAL.]

In presence of—
JAS. G. LAWRENCE.
J. G. DILL.

STATE OF MINNESOTA, } ss:
County of Wabasha, }

On the 17th day of April, A. D. 1893, before me personally appeared John H. Mullen, C. C. Hirschy, Jacob Tenney, L. Whitmore, Samuel Hirschy, Alice G. Lawrence, and Malcolm Kennedy, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

JOHN N. MURDOCH,
[NOTARIAL SEAL.] *Notary Public, Wabasha Co.*

STATE OF MINNESOTA, } ss:
County of Wabasha, }

C. C. Hirschy, Jacob Tenney, L. Whitmore, Samuel Hirschy, and Malcolm Kennedy, being duly sworn, says, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth the amount of one thousand dollars, being one-fifth of the sum specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

C. C. HIRSCHY.
JACOB TENNEY.
L. WHITMORE.
SAMUEL HIRSCHY.
MALCOLM KENNEDY.

Subscribed and sworn to before me this 17th day of April, 1893.

JOHN N. MURDOCH,
[NOTARIAL SEAL.] *Notary Public.*

214 Alice G. Lawrence, being duly sworn, says for herself that she is one of the sureties above named; that she is a resident and freeholder of the State of Minnesota and worth the amount of one thousand dollars, being one-fifth of the sum specified in the foregoing bond, above her debts and liabilities and exclusive of her property exempt from execution.

ALICE G. LAWRENCE.

Sworn to — me this 17th day of April, 1893.

JAMES G. LAWRENCE,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Received and filed April 17, 1893. M. J. O'Laughlin, county auditor.

We hereby approve the within bond and sureties.

ANSON PIERCE,
JACOB TENNEY,
T. P. NEPPER,
JAMES McGINN,
Co. Commissioners of Wabasha County.

Attest: M. J. O'LAUGHLIN, *Co. Aud.*

215 DEFENDANTS' EXHIBIT 3.

WABASHA, *July 3rd*, 1893.

The Minnesota Boom Company Dr. to John H. Mullen, surveyor general of logs & lumber, 4th district, State of Minnesota.

To surveying 183,062,290 feet, in logs, at West Newton boom, for the month ending June 30th, 1893, the same being statutory fee therefor at the rate of 5c. per thousand..... $9,153.10

STATE OF MINNESOTA, } ss:
County of Wabasha, }

The surveyor general of logs & lumber for the fourth district of Minnesota hereby certifies:

That all the logs mentioned in the scale bill hereto affixed ran out of the Minnesota Boom Company during the month of June, 1893.

That he duly surveyed all said logs running out of said boom during said month.

That the true aggregate amount due to him for his said survey and upon said scale bill is the sum of $9,153.10.

That he has said lien upon said logs and on the marks thereof mentioned in said scale bill respectively at the rate of five cents per thousand feet for each thousand feet of said logs.

That he has surveyed and scaled said logs relying upon and in reliance on his said lien.

That he hereby claims a lien on said logs, scale bill, and log marks for said aggregate sum of $9,153.10, and on each one of said log marks respectively for five cents per thousand feet for each thousand feet of logs bearing such mark that was so surveyed during said month.

[Seal Surveyor Gen'l, 4th Dist., Minn.]

JOHN H. MULLEN,
Surveyor Gen. L. & L., 4th Dist., Minn.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

220

220-222

Defendant's Exhibit 3 cont'd. (Sheet 33)

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., June 12th 1893.

Bill of Pine Logs scaled to the mark for the Minnesota Boom Company during the month of June A. D. 189 , at West Newton Boom. June 12 1893. SCALED BY J. H. MULLEN AND DEPUTIES.

Date.	Marks.	Logs.	Feet.	Date.	Marks.	Logs.	Feet.
	Bt.Forwd.	532,342	72,945,650		Bt.Forwd.		
June 12/93	Y ⌀ B	33	5,270				
	Y A	10	2,060				
	Y U	66	7,360				
	Y 7	63	7,970				
	Y ⌀	14	1,580				
	Y E ϟ	1,044	119,210				
	Y ⌇ Z	430	61,550				
	Y V	40	6,180				
	Y △	18	2,690				
	K X M	1	140				
	◈	1	80				
	Y ϟ L	1	140				
	Y P J	2	360				
	⌀	1	60				
	J X A	5	1,850				
	◈ st	1	50				
	⌇ 7 ⌇	78	13,600				
	⌇ ⌇	1	400				
	~~Z~~ ~~W~~	4	240				
	Z ◊ H	9	950				
	Forwd.						

Ford	534,164	73,177,190	
Total		Forwd	

Surveyor General Fourth District Minnesota,
By _____ Deputy.

220

Defendants Exhibit 3 cont'd. Sheet 45

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., June 14,1893.

Bill of Pine Logs scaled to the mark for the Minnesota Boom Company during the month of June A D, 1893, at West Newton Boom.

SCALED BY J. H. MULLEN AND DEPUTIES.

Date.	Marks.	Logs.	Feet.	Date.	Marks.	Logs.	Feet
	Bt. Forwd.	629,639	86,336,020		Bt Forwd.		
June 14/93	Y E ϟ	1,247	122,770	June 14/93			
	ψ	2	310				
	ϟ ϟ	13	1,210				
	Y P J	7	340				
	X N L X	1	190				
	Y A	8	1,740				
	Y ✱ ◇	2	320				
	; E !	74	18,200				
	Z ψ	49	4,790				
	Z N Σ	3	260				
	K I M	1	90				
	Forwd.	630,946	86,483,230				
	Total		Forwd.				

Surveyor General Fourth District, Minnesota.

By _____ Deputy.

224

Defendants Exhibit 3 cont'd. Sheet 43.

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., June 15th 1893.

Bill of Pine Logs scaled to the mark for the Minnesota Boom Company during the month of June A. D. 1893, at West Newton Boom.

June 15 1893. SCALED BY J. H. MULLEN AND DEPUTIES.

Date.	Marks.	Logs.	Feet.	Date.	Marks.	Logs.	Feet.
	Bt Forwd	675,611	92,501,150				
					Bt Forwd.		
June 15/93		1	550				
		14	2,340				
		1	30				
		1	40				
		5	410				
		1	20				
		28	2,910				
		1	80				
		1	00				
		1	90				
		30	5,770				
		48	4,660				
		1	80				
		39	6,280				
		1,699	274,210				
		4	820				
		1	90				
		4	550				
		12	1,110				
		1	60				
		1	20				
		2	430				
		5	830				
		5	580				
		435	61,760				
		867	136,550				
		157	18,400				
		358	44,420				
		9	3,700				
		2	140				
		2	160				
		440	70,800				
		340	48,310				
		315	49,390				
		34	5,180				
		557	71,510				
		1,380	190,600				
		2	220				
	Forwd	682,505	93,504,240				
	Total				Forwd.		

Surveyor General Fourth District, Minnesota.

By _____ Deputy.

225

Defendants Exhibit 3 cont'd. (Sheet 60)

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., June 22, 1893.

Bill of Pine Logs scaled to the mark for the Minnesota Boom Company during themonth of June A. D. 1893, at West Newton Boom.

SCALED BY J. H. MULLEN AND DEPUTIES.

Date.	Marks.	Logs.	Feet.	Date	Marks.	Logs.	Feet.
	Bt.Forwd	969,909	140,210,290	By Forwd.			
June 22/93	8 7	166	21,650	June 22/93			
	⌐ ⌐	794	83,690				
	⌐	78	8,210				
	⌐	11	1,190				
	⌐	25	2,210				
	7 4 7	525	83,140				
	7 1 0	345	46,590				
	0 / 0	915	142,110				
	⌐ 0 ⌐	341	46,260				

Forwd	973,109	140,638,540
Total		Forwd

Surveyor General Fourth District, Minnesota.

By _____ Deputy.

229

Defendants Exhibit 4.

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., May 15, 1893.

Bill of Pine Logs scaled to the mark for the Minnesota Boom Company from 4s May 15, A D. 1893, at and below West Newton Boom.

SCALED BY J. H. MULLEN AND DEPUTIES.

Mark recorded to at Date of Sale.	Marks.	No. logs.	Feet.
	N V X'	6	940
	A / X /	2	520
	B A N	10	2,100
	X H. X	1,428	247,350
	C U D	191	18,580
	/ x /	1,944	252,880
	X T	102	20,900
	X / 4 X	2	500
	X T X	4	1,140
	X V / /	5	700
	V T	199	37,640
	E W	168	25,910
	E L M	2	790
	E S A	8	1,010
	F D F	24	7,160
	L W	85	16,000
	/	1	160
	H	304	44,200
	H X N /	1	240
	K Y E	1,037	159,010
	K A N	1	140
	L N L	27	3,760
	L	1	050
	L U K	1	050
	L E	1	160
	L U M	3	810
	L O	1	180
	N	1	050
	N ' N	1	060
	N O N	1	200
	N x N	4	1,180
	N	1	060
	N / P	1	110
	P	372	45,100
	P E N	5	630
	R U M	1	160
	S A M	895	149,260
	S E x	1	060
	S N S	4	530
	S J	5	930
	/	79	10,770
	T S U	4	510
	T C T	4	920
	U S A	39	4,030
	V H	1	080
Total		6,977	1,083,500

Surveying $52.67

J.H.Mullen,
Surveyor General Fourth District, Minnesota.
By Johnson, Deputy.

232

Defendant Exhibit 4 continued.

SURVEYOR GENERAL'S OFFICE, Minn., 189

Bill of Pine Logs scaled to the Mark for the Minnesota Boom Company, from to A. D. 189

at and below West Newton Boom.

SCALED BY J. H. MULLEN AND DEPUTIES.

Mark Recorded to at Date of Sale.	Marks.	No. Logs.	Feet.
		49,025	7,839,110
	(W D) st.	1	180
	Y	19	2,430
	Y Y	27	2,380
	Y / A	56	9,400
	Y /	93	11,570
	Y / L	56	7?040
	Y / E	3,545	730,790
	Y T x	1	. 230
	Y E	1,092	125,990
	Y L A	3	310
	Y N T	2	180
	Y /	4	1,340
	Y / '	1	180
	Y X Y	1	580
	/	1	710
	2 / A	1	110
	..Z..	3	460
	2 P	269	40,720
Total,		54,200	8,773,710

J. H. Mullen,
Surveyor General Fourth District, Minnesota.

Surveying $438.68

By Johnson, Deputy.

233

Defendant Exhibit 4 concluded.

SURVEYOR GENERAL'S OFFICE.

Wabasha, Minn., 189

Bill of Pine Logs scaled to the mark for the MinnesotaBoom Company, from to A. D. 189

at and below West Newton Boom. Recapitulation Sheet.

SCALED BY J. H. MULLEN AND DEPUTIES.

Mark recorded to at Date of Sale.	Date.	No.Logs.	Feet.	$
	1893.			
May	15th.	6,977	1,053,500	52.67
"	16th.	15,492	2,335,350	116.77
"	17th.	15,699	2,596,480	129.82
"	18th.	9,695	1,554,560	77.73
"	19th.	19,605	3,098,300	154.91
"	20th.	2,029	347,360	17.37
"	22d.	19,550	2,881,370	144.07
"	23d.	20,795	3,048,770	152.44
"	24th.	9,541	1,413.030	70.65
"	29th.	32,715	4,433,130	221.66
"	30th	48,398	7,180,950	359.05
"	31st.	34,200	8,773,710	438.68
		254,996	38,716,510	1,935.82

Total.

Surveyor General Fourth District, Minnesota.

Surveying $ _____ By _____ Deputy.

Exhibit 4 concl'd.

State of Minnesota.)
(ss.
County of Wabasha.)

The Surveyor General of logs and lumber for the Courth District of Minnesota, hereby certifies:

That all the logs mentioned in the scale bill hereto affixed, ran out of the boom of the Minnesota Boom Company, during the month of May A. D. 1893.

That he duly surveyed all said logs running out of said boom during said month.

That the true aggregate amount due to him for his said survey and upon said scale bill, is the sum of $1935.82.

That he has said lien on said logs and on the marks thereof mentioned in said scale bill, respectively at the rate of Five cents perthousand feet for each thousand feet of said logs.

That he has surveyed and scaled said logs relying upon and in reliance on his said lien.

That he hereby claims a lien on said logs, scale bill and log marks for said aggregate sum of $1935.82 and on each one of said log marks severally for Five cents per thousand feet for each thousand feet of logs bearing such mark that was so surveyed during said month.

J. H. Mullen,

Surveyor Genl.4th Dist.

(Seal Surveyor General 4th Dist.) Minn.

Received

Jun 16 1893

Answered .

2315

3080
133

Defendant's Exhibit 8.

To the Minnesota Boom Company, the Managing Agent thereof, and whomsoever it may concern:

You and each of you are hereby notified that the undersigned, the Surveyor General of logs, lumber and timber of and for the Fourth District of the State of Minnesota, has seized and taken actual possession of all the saw logs contained in the fourteen brails of logs numbered as follows, that is to say: 2470, 2387, 2407, 1637, 2304, 2444, 2469, 2306, 2226, 2222, 2272, 2406, 2310, 2229, which said brails of logs are now located along the west or Minnesota shore of the Mississippi River immediately above the Village of Minneiska in Wabasha County in said state, and the saw logs in which said brails bear the log marks and contain the number of feet board measure of each log mark expressed and set forth in Exhibit "A" hereof.

You and each of you are hereby further notified that said seizure has been made and possession taken by said Surveyor General to enforce payment of certain fees of said Surveyor General for surveying the logs running out of the boom of the said Minnesota Boom Company during the month of June 1893, which fees amount to the sum of ninety one hundred fifty three & 1o/1oo dollars. $9153.10).

John H. Mullen.

Surveppr General of Logs, Lumber and Timber, for the Fourth District of the state of Minnesota.

Exhibit "A".

Brail No. 2306.

Log Marks.	Logs.	Quantity. Feet
[illegible]	1	300
Y : Z	15	1880
I K	23	2280
J V	5	480
[illegible]	7	310
L N L	5	740
[illegible]	6	900

236

Exhibit 5 Cont'd.

T ◇ T	2	370
T S U	2	140
T U E	1	100
S J	26	3160
Y Ψ (Stamp'	22	2210
Y E S	221	21950
ϒ V ϒ	286	21450
A	1	80
T T T	1	110
	627	56460

Brail No. 2470 Scaled June 29th 1893.

Lot Marks.	Logs.	Quantity. Feet.
F D F	4	1,370
S A M	976	135,900
	980	137,270

Brail No. 2387, Scaled June 29th 1893.

1 W A	8	860
Y ◇ A	43	6160
B Y	5	770
E E E	2	460
S A M	8	890
⟩ ⟩ ⟩	401	59,320
F E N	501	62,540
	965	130,000

Brail No. 2469. Scaled June 29th 1893.

Y E S	1029	108,660

Brail No. 2272. Scaled June 26th 1893.

F D F	7	1,730
S A M	1,045	126,510
	1,052	128,240

Exhibit 8 cont'd.

Brail No.2304. Sealed June 27th 1893.

Log Mark s.	Logs.	QuaNtity.	Feet.
1 W A	3		310
Y ◇ A	53		7080
B Y	7		1010
E E E	2		280
S A M	8		870
⟩⟩⟩	448		55,570
P E. M	533		69,200
L M	1		40
1 W A.	1		00
P D P	1		70
	1,057		134,430

Brail No. 2407. Sealed June 28th 1893.

N	1		350
P D P	12		3,820
S A M	983		133,000
	996		137,170

Brail No.2444. Sealed June 28th 1893.

Log Marks.	No. of Logs.	Quantity.	Feet
Y E S	1,044		113,280
Y P J	1		110
Total,	1,045		113,390

Brail No.2228. Sealed June 23rd 1893.

P D P	21		3,170
S A M	972		123,710
	993		126,880

Brail No. 2406. Sealed June 29th 1893.

N	1		100
H W E	2		90
M T W	1		60
J J	1		80
S A M	1		00

288

Exhibit 5 cont'd .

~~	1	180
Y ◇ A	7	860
F & +	1	160
	834	67,350

Brail No.2229. Sealed June 24th 1893.

S A M	1	500
M T W	1	30
J . J	1	180
V / "	1	100
1 N V	1	280
W M D	21	2100
N	954	102,880
	980	106,070

241 DEFENDANTS' EXHIBIT 6.

To the Minnesota Boom Company, the managing agent thereof, and whomsoever it may concern:

You and each of you are hereby notified that the undersigned, the surveyor general of logs, lumber, and timber of and for the fourth district of the State of Minnesota, has seized and taken actual possession of all the saw-logs contained in the 16 brails of logs numbered as follows—that is to say: 2470, 2387, 2407, 1637, 2304, 2444, 2469, 2306, 2228, 2222, 2272, 2406, 2310, 2229, 1030, 1945; which said brails of logs are now located along the west or Minnesota shore of the Mississippi river immediately above the village of Minneiska, in Wabasha county, in said State, and the saw-logs in which said brails bear the log mark expressed and set forth in Exhibit A" hereof.

You and each of you are hereby further notified that said seizure has been made and possession taken by said surveyor general to enforce payment of certain fees of said surveyor general for surveying the logs running out of the boom of the said Minnesota Boom Company during the month of May, 1893; which fees amount to the sum of nineteen hundred thirty-five & $\frac{82}{100}$ dollars.

JOHN H. MULLEN,
Surveyor General of Logs, Lumber, and Timber for the Fourth District of the State of Minnesota.

[Seal of Surveyor General, 4th Dist.]

(Here follows map marked page 242.)

243 DEFENDANTS' EXHIBIT 9.

Office of surveyor general logs and lumber, second district of Minnesota.

MINNEAPOLIS, MINN., *Aug.* 13, 1897.

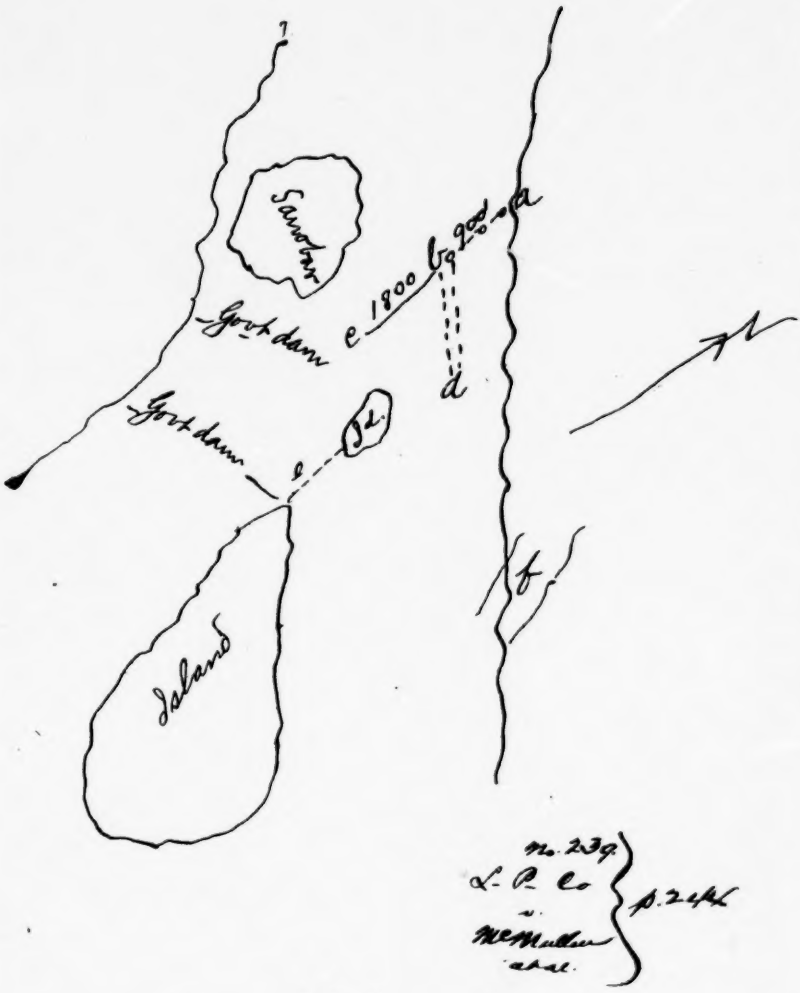
I hereby certify that the following log marks are of record in this office in name following mark and date of record shown:

B Y	N. P. Clarke & Co., May 22nd, 1890.
I W A	State of Minnesota, Sept. 25th, 1889.
Z M Z	Bovey De Laittre Lmbr. Co., Ap'l 17th, 1889.
T T T	J. S. Pillsbury, Sept. 9th, 1893.

S. S. BROWN,
Sur. Gen'l 2nd Dist.,
By SINCLAIR, *Dep'y.*

(Here follows diagram marked page 244.)

Plaintiff's Exhibit A.



244

Plaintiff's Exhibit E. 144

A S A

J E N

V l l

V XX

H A W

J N

W M W

4 7

V

S I D

Y Y F

V X X V

J A

W R

A B L

N L L

V l 4

Y Z

H V K

W E S

Plaintiff's Exhibit F.

1893.			
June 1 -	A S A-	375-	63,340
2 -	J K N -	33 -	6,400
2 -	V 1 1	857 -	124,430
3 -	V	12 -	2,090
8 -	H A W -	119 -	12, 140
22 -	J N -	2789 -	344,950
" -	W N W -	124 -	16,430
23 -	4 7	11 -	1,090
" -	V	41 -	4,010
24 -	S I D	127 -	17,540
" -	Y Y P	26 -	2,530
" -	Y Y P	28 -	4,190
26 -	V X X V	25 -	2,620
27 -	V X X V	45 -	7,490
28 -	J A	222 -	30,300
"	V	535 -	90,060
" -	W R	12 -	1, 570

1893.		May 1893.	
May 17,	A B L	695	105,700
18,	N L L	38	6,470
22,	V 1 4	47	8,740
23,	Y Z	1, 124	176,460
29	H V K	11	1,370
"	W E S	55	12,090

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Plaintiff's Exhibit G.

A S A

J E N

V 1 1 Nov.28,1888-Cut by J.C.Pope- owned by State of Minnesota.

V XX

H A W

J N

W N W

4 7

V ℓ

S 1 D

Y Y P

V X X V

J A

W R Apr.14,1892- cut and owned by A.D.Merriam & Co.

A B L

N L L

V 1 4

Y Z

H V K

W E S

251 PLAINTIFF'S EXHIBIT H.

I hereby adopt the following mark for logs on the Chippewa river and its tributaries, and will claim all logs marked thus, T T T, for a bark mark, and thus, G A B, for an end stamp.

Dated Nov. 17th, 1891.

VALLEY LBR. CO.

STATE OF WISCONSIN, } ss:
County of Chippewa, }

I, D. L. McKay, do hereby certify that I am the lumber inspector of district No. 6, in the State of Wisconsin, having my office at the city of Chippewa Falls, in said State; that as such lumber inspector I am the keeper of the record of all log marks recorded in said lumber district; that I have carefully compared the copy of record of log marks hereto attached with the original record thereof, found on page 29 of Log Ledger No. 4, such book being one of the books in said lumber inspector's office and now in my legal custody as such lumber inspector and a record in my office, and that the same is a true and correct copy of the record of such log marks and of the whole thereof and a correct transcript therefrom and of the date of recording same.

In witness whereof I have hereunto set my hand, this office having no seal, this 14th day of August, A. D. 1897.

D. L. McKAY,
Lumber Inspector of District No. 6, in the State of Wisconsin.

252 PLAINTIFF'S EXHIBIT J.

I hereby adopt the following marks for logs on the Chippewa river and its tributaries, and will claim all logs marked thus, Z M Z, for a bark mark, and thus, Z M Z, for an end stamp.

Dated Nov. 16, 1889.

(Sgs.) S. SERLEY.

STATE OF WISCONSIN, } ss:
County of Chippewa, }

I, D. L. McKay, do hereby certify that I am the lumber inspector of district No. 6, in the State of Wisconsin, having my office at the city of Chippewa Falls, in said State; that as such lumber inspector I am the keeper of the record of all log marks recorded in said lumber district; that I have carefully compared the copy of record of log marks hereto attached with the original record thereof, found on page 13 of Log Ledger No. 4, such book being one of the books in said lumber inspector's office and now in my legal custody as such lumber inspector and a record in my office, and that the same is a true and correct copy of the record of such log marks and of the whole thereof and a correct transcript therefrom and of the date of recording same.

In witness whereof I have hereunto set my hand, this office having no seal, this 14th day of August, A. D. 1897.

D. L. McKAY,
Lumber Inspector of District No. 6, in the State of Wisconsin.

253 EXHIBIT A 1.

STATE OF MINNESOTA, }
County of Wabasha, } *ss:*

The surveyor general of logs & lumber for the fourth district of Minnesota hereby certified—

That all the logs mentioned in the scale bill hereto affixed ran out of the Minnesota Boom Company during the month of June, 1893.

That he duly surveyed all said logs running out of said boom during said month.

That the true aggregate amount due to him for his said survey and upon said scale bill is the sum of $9,153.10.

That he has said lien upon said logs and on the marks thereof mentioned in said scale bill respectively at the rate of five cents per thousand feet for each thousand feet of said logs.

That he has surveyed and scaled said logs, relying upon and in reliance on his said lien.

That he hereby claims a lien on said logs, scale bill, and log marks for said aggregate sum of $9,153.10, and on each one of said log marks respectively for five cents per thousand feet for each thousand feet of logs bearing such mark that was so surveyed during said month.

JOHN H. MULLEN,
Surveyor General L. & L., 4th Dist., Minn.

254 EXHIBIT B 1.

WABASHA, *July 3rd*, 1893.

The Minnesota Boom Company Dr. to John H. Mullen, surveyor general of logs & lumber, 4th district, State of Minnesota.

To surveying 183,062,290 feet in logs, at West Newton boom, for the month ending June 30th, 1893, the same being statutory fee therefore at the rate of 5c. per thousand $9,153.10

(Endorsed:) Bill of exceptions. Filed Dec. 23rd, 1897. Henry D. Lang, clerk.

255 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

Now comes the above-named plaintiff in error, Lindsay & Phelps Company, and assigns the following errors, which said plaintiff in error alleges were, upon the trial and determination of said cause, committed by the court, and wherefrom the judgment was rendered in the above-entitled action on the 19th day of August, 1897, in favor of the above-named defendants in error and against this plaintiff in error, for the return of the following-described property, to wit:

One full brail of pine logs, numbered 2222, containing 1,064 logs, which scale 134,160 feet.

One full brail of pine logs, numbered 2228, containing 1,007 logs, which scale 132,120 feet.

One full brail of pine logs, numbered 2272, containing 1,071 logs, which scale 133,650 feet.

One narrow brail of pine logs, numbered 1030, containing 596 logs, which scale 70,650 feet.

One narrow brail of pine logs, numbered 1737, containing 658 logs, which scale 68,130 feet.

One full brail of pine logs, numbered 2304, containing 1,046 logs, which scale 138,230 feet.

One full brail of pine logs, numbered 2407, containing 1,004 logs, which scale 143,270 feet.

One full brail of pine logs, numbered 2387, containing 1,020 logs, which scale 141,380 feet.

256 One full brail of pine logs, numbered 2470, containing 990 logs, which scale 144,270 feet.

Or in case of the failure to return said property for the sum of fifteen thousand six hundred thirty-two dollars and thirteen cents ($15,632.13), with costs and disbursements, to be taxed, should be in all things reversed and set aside.

I.

Said court erred in admitting the articles of incorporation of the Minnesota Boom Company (Exhibit No. 1), which, omitting signatures and acknowledgements, is as follows:

Articles of Incorporation of the Minnesota Boom Company.

For the purpose of organizing a corporation under the laws of the State of Minnesota, we, the undersigned, do hereby associate ourselves as a corporation and adopt the following articles of incorporation:

Article I. The name of this corporation shall be the "Minnesota

Boom Company." The general nature of the corporate business shall be the construction, maintenance and use of booms, dams, and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi river, or either bank thereof, between the mouth of the Chippewa river or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also upon, or on any side or bank of any slough, bayou, branch or part of the Mississippi river between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation, besides the construction, maintenance and operation of said structures shall be gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling, any and all logs, lumber and timber of any kinds, between the limits and upon the waters and territory above stated, for any and all persons
257 having any logs, lumber or timber upon any of said waters or within said territory, and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with those logs, lumber or timber — any work or services *are* done by this corporation, a proper sum and compensation by it to be fixed for such work or services and this corporation shall also do any other business incident to any part of the general business aforesaid.

The principal place of business of the corporation shall be the city of Winona, Winona county, Minnesota.

Article II. The time of the commencement of this corporation shall be April 16th, 1889, and it shall continue thirty years.

Article III. The amount of the capital stock of this corporation shall be one hundred thousand dollars ($100,000) and it shall be paid in at the time and in the amounts and manner prescribed by the board of directors. Such capital stock shall be divided into one thousand shares of one hundred dollars ($100) each.

Article IV. The highest amount of indebtedness or liability to which said corporation shall at any time be subject is fifty thousand dollars ($50,000).

Article V. The names of the persons forming this corporation are: William H. Laird, A. F. Hodgins, A. B. Youmans, James L. Norton, Andrew Hamilton and William Hayes. All of said corporators reside at the city of Winona, Minnesota.

Article VI. The government of said corporation and the management of its affairs shall be vested in a board of five directors, who shall be stockholders, and the corporate officers shall be a president, vice-president, secretary and treasurer, who shall be elected by the directors from their number. Said directors and officers shall hold their offices for one year and until their successors are elected and qualify. The board of directors shall have authority to adopt suitable by-laws for the government of the corporation. The annual meeting of the stockholders of this corporation shall be held
258 on the fourth Tuesday of May in each year and at this meeting the directors shall be elected. At their first meeting

after such annual meeting of stockholders, the directors shall annually elect the corporate officers.

The first directors of the corporation shall be William H. Laird, A. F. Hodgins, A. B. Youmans, James L. Norton, and William Hayes. The first officers shall be: William H. Laird, president; A. B. Youmans, vice-president; William Hayes, secretary, and A. F. Hodgins, treasurer. These first officers and directors shall hold office until the annual meeting of stockholders in May, 1889, and until their successors are elected and qualified.

In witness whereof, we have hereunto set our hands and seals at the city of Winona, Minnesota, on this 5th day of April, 1889.

in evidence against the objections of the plaintiff that said paper was immaterial, and to which ruling the plaintiff duly excepted.

II.

The court erred in admitting in evidence the commission of the defendant Mullen (a copy of which is attached to the bill of exceptions and marked "Exhibit No. 2") against the objections of the plaintiff that the said paper was immaterial and incompetent, and to which ruling the plaintiff duly excepted.

III.

The court erred in overruling plaintiff's objection, made during the trial of the cause and after the defendants' exhibits numbered 1 and 2, referred to in the foregoing assignment, of error I and II, had been received in evidence, to any further evidence under the answer in this cause upon the ground that said answer does not state any facts which constitute any defense to this action, and upon the ground that the same is immaterial, irrelevant, and incompetent, and to which ruling the plaintiff duly excepted.

259 IV.

The court erred in admitting in evidence the certified copy of the official oath and bond of the defendant Mullen (a copy of which is attached to the bill of exceptions) against the objection of the plaintiff that the said paper was immaterial and irrelevant, and to which ruling the plaintiff duly excepted.

V.

The court erred in receiving in evidence Defendants' Exhibit 3, each page of which is headed as follows:

SURVEYOR GENERAL'S OFFICE,
WABASHA, MINN., *June* —, 1893.

Bill of Pine Logs Scaled to the Mark for the Minnesota Boom Company During the Month of ——, 18—, *at West Newton Boom.*

Scaled by J. H. Mullen and deputies.

Date.	Mark.	Logs.	Feet.	Date.	Marks.	Logs.	Feet.

and upon each page of which are a large number of different log marks with the number of logs and number of feet of each mark set opposite such mark. The last page is signed:

JOHN H. MULLEN,
Surveyor General, Fourth District, Minnesota.

and shows a total of 1,265,741 logs, containing 183,062,299 feet. The whole paper contains 78 pages, and it is impracticable to incorporate it in this assignment of error, against the objection of the plaintiff that the same was incompetent, and to which ruling the plaintiff duly excepted.

VI.

The court erred in receiving in evidence Defendants' Exhibit 4, a paper containing 70 pages of written and printed matter similar to Exhibit 3, except it purports to be a scale bill for the month of May, and shows a total of 254,996 logs, containing 38,716,510 feet, and which exhibit it is also impracticable to incorporate in this assignment of error, against the objection of the plaintiff that
260 the same was incompetent; to which ruling the plaintiff duly excepted.

VII.

The court erred in receiving in evidence Defendants' Exhibit 5, *to* the material portion whereof is as follows:

"To the Minnesota Boom Company, the managing agent thereof, and whomsoever it may concern:

You and each of you are hereby notified that the undersigned, the surveyor general of logs, lumber, and timber of and for the fourth district of the State of Minnesota, has seized and taken actual possession of all the saw-logs contained in the fourteen brails of logs numbered as follows—that is to say, 2470, 2387, 2407, 1637, 2304, 2444, 2469, 2306, 2228, 2222, 2272, 2406, 2310, 2229, which said brails of logs are now located along the west or Minnesota shore of the Mississippi river immediately above the village of Minneiska, in Wabasha county, in said State, and the saw-logs in which said brails bear the log marks and contain the number of feet board measure of each log mark expressed and set forth in Exhibit 'A' hereof.

You and each of you are hereby further notified that said seizure has been made and possession taken by said surveyor general to enforce payment of certain fees of said surveyor general for surveying the logs running out of the boom of the said Minnesota Boom Company during the month of June, 1893; which fees amount to the sum of ninety-one hundred fifty-three and $\frac{10}{100}$ dollars ($9,153.10).

JOHN H. MULLEN,
Surveyor General of Logs, Lumber, and Timber for the Fourth District of the State of Minnesota."

And here follows a description of the 14 brails of logs, with the log marks, number of logs, and number of feet of each mark as

claimed to exist by the defendant Mullen, against the objection of the plaintiff that said paper was incompetent, immaterial, and irrelevant; to which ruling the plaintiff duly excepted.

VIII.

The court erred in receiving in evidence Defendants' Exhibit 6, the material portion thereof is precisely like Exhibit 5, referred to in the foregoing assignment of error VII, except that the claim is made for scaling during the month of May, 1893, and the fees claimed amount to the sum of $1,935.82, against the objection of the plaintiff that the same was incompetent, irrelevant, and immaterial; to which ruling the plaintiff duly excepted.

261 IX.

The court erred in refusing to permit the plaintiff to show by the witness Mullen on his cross-examination that at no time during the period covered by Defendants' Exhibits 3 and 4 was there any record in his office of any log mark, and in sustaining defendants' objection to such testimony on the ground that the same was immaterial; to which ruling the plaintiff duly excepted.

X.

The court erred in admitting the evidence of William Foreman, as follows:

"Q. You may state whether or not there were any obstructions put in your way by the boom company to the work that the surveyor general was doing or attempting to do there.

"The plaintiff objected to the question as immaterial and incompetent.

"A. There was; yes, sir.

"Q. You may state what.

"The plaintiff objected to said question as immaterial and incompetent.

"A. By their men getting on and being in the way when we started. We would have to wait until they got five courses ahead, and then, if our men weren't there, they would run them out and run them off down the river."

And in refusing to strike out the last answer of the witness as not responsive to the question and as immaterial and irrelevant; to which ruling the plaintiff duly excepted.

XI.

The court erred in admitting, against the objection of the plaintiff, the following testimony of John H. Mullen:

(Mr. Mullen had testified that he knew Mr. Thomas Irvine, who was the secretary of the Minnesota Boom Company in the year 1893, and that he had a conversation with him (Irvine) as to who was in charge there.)

262 "Q. You may state what he said as to who was in charge of the Minnesota Boom Company.

"The plaintiff objected to this question as immaterial and incompetent.

"A. He said Mr. Scott was—George Scott."

To which ruling the plaintiff duly excepted.

XII.

The court erred in admitting, against the objection of the plaintiff, the following testimony of William Foreman:

(This witness had also testified that he knew Thomas Irvine and that he was present at a conversation between Irvine and the defendant Mullen in 1893 in regard to the management of the boom down at West Newton; that he would not be positive that the name of the Minnesota Boom Company was mentioned, but the name "boom company" was mentioned, and that something was said about Mr. Scott.)

"Q. What was said?

"The plaintiff objected to this question as immaterial and incompetent.

"A. Mr. Irvine stated that in his absence Mr. Scott had full control there."

To which ruling the plaintiff duly excepted.

XIII.

The court erred in denying plaintiff's motion for judgment made at the close of defendants' case upon the ground that, from all of the evidence in the case as it then stood, the defendants had failed to show any interest in or lien upon or right to possess the property described in the complaint in the action now on trial.

To which ruling the plaintiff duly excepted.

XIV.

The court erred in sustaining the defendants' objection to the following question put to the witness Douglass:

263 (This witness, who was manager of the booms at West Newton, had testified that two-thirds of the logs that come through the boom belonged to the Mississippi River Logging Company and the Chippewa Logging Company, and that there were several hundred different marks belonging to these companies, and that all these marks and all of the logs of these several hundred marks were put into one pocket or one set of pockets as they came through. No attempt was made to sort those marks, and that they would not have had room to assort the logs if all of these marks had had to be assorted severally as their marks were.)

"Q. Would the delay that would have been occasioned have been such as to prevent getting anywhere near the full amount of logs through in any one season?

"The defendants objected to the question as immaterial."

To which ruling the plaintiff duly excepted.

XV.

The court erred in sustaining the defendants' objection to the following question put to the witness Douglass:

"Q. Now, I will ask you this question: State, if you know, who, during all the time for the several days set opposite the two marks on Exhibit 9, was treated and recognized by you and the men under you as the owner of these two marks and to whom the logs bearing these two marks were delivered.

"The defendants objected to the question as immaterial and as calling for the conclusion of the witness.

"The court said: What would the testimony tend to show?

"Counsel for plaintiff stated: The testimony tends to show that during all of these years these logs running through this boom were treated as belonging to the Lindsay & Phelps Company, and to follow it up by showing that no one else has ever made any claim to them, and then we shall offer to show that none of these logs with that mark ever got into that boom.

263½ "DEFENDANTS' COUNSEL: We object to it because it is not competent testimony to prove title, and, as far as ownership is concerned, the court has held that ownership has been proved.

"The court then sustained the objection."

To which ruling the plaintiff duly excepted.

XVI.

The court erred in sustaining the defendants' objection to the following question put to the witness Douglass:

"Q. Has any one else other than the Lindsay & Phelps Company ever made any claim there at the boom to any logs bearing either of the first two marks on this Exhibit 9?

"Defendants' counsel objected to this question as immaterial, incompetent, and no foundation laid."

To which ruling the plaintiff duly excepted.

XVII.

The court erred in sustaining the defendants' objection to the following question put to the witness Douglass:

"Q. Were there any brails of logs taken out of any other pockets and dropped down the river until it was necessary to do so in order to carry on the business there?

"To which question the defendant objected as calling for the conclusion of the witness."

To which ruling the plaintiff duly excepted.

XVIII.

The court erred in sustaining the defendants' objection to the following question put to the witness Levi P. Smith:

"Q. You may state, if you know, how these logs are scaled that are taken in by these companies that you have named at Chippewa Falls and Eau Claire.

"The defendants objected to the question as immaterial."

And in refusing to permit the plaintiff to prove by this witness that all of the logs of the Chippewa Logging Company and
264 of the Mississippi River Logging Company, which come down the Chippewa river, whether they are taken at Chippewa Falls or Eau Claire by members of the Chippewa Logging Company or whether they are assorted and divided among the members at West Newton, are scaled full—that is, without making any deduction whatever for rot, crook, or other defects that may appear to be in the logs—and which testimony plaintiff proposed to follow by the testimony of other witnesses and by the testimony of this witness, showing that the scale is made in this manner for the purpose of making an equitable division among the members of the Chippewa Logging Company and the Mississippi River Logging Company.

All of which testimony was objected to by the defendants as immaterial.

To which ruling the plaintiff duly excepted.

XIX.

The court erred in sustaining the objection of the defendants to the following question put to the witness Artemus Lamb:

"Q. I wish you would state the method of doing business by the Chippewa Logging Company from the time that the logs were cut in the woods until they were sorted out of the booms, or wherever they were sorted, and how the division is made between the various members of that company of the logs which belong to that company.

"To which question the defendants objected as immaterial and *immaterial and* incompetent, as being a question which the court had already ruled out, and also because this matter is carried out by the books of the company to which the defendants have no access."

And also in refusing to permit the plaintiff to show by this witness:

"That the logs are cut from timber owned by the Chippewa Logging Company by their own men and teams or by jobbers and delivered in the waters of the Chippewa, and that they were driven by what is termed a driving company down to Eau Claire, on the Chippewa; that when they got to Chippewa Falls and Eau Claire
265 certain members of the Chippewa Logging Company are entitled to a certain percentage of the logs cut or bought the previous year. It is the custom to take into the boom a certain number of hours and days, and then they are passed down the river for a certain number of hours and days, which is determined by the per cent. that belongs down the river and by the per cent. that belongs at Eau Claire. Then there are scalers appointed by the Chippewa Logging Company for each mill which belongs to the pool. This has reference to the Chippewa Falls and Eau Claire members. They are at the foot of the skip and scale all logs as they come. These logs, then, that belong to the Mississippi River Logging Company are brought on to West Newton, Minnesota, and there they are boomed and rafted by the Mississippi River Logging Company

and are scaled by scalers appointed by the company by the same methods that are used at Eau Claire. The method of scaling at Eau Claire is what is termed the full scale—that is, without making any deductions for defects—and the same thing is done at West Newton—that is, for adjustment between the members of the company—that is, between the Eau Claire people and the Mississippi River Logging Company; that the proportion or percentage of the logs that each member of the Mississippi River Logging Company is entitled to take is arrived at by the amount of their subscription to the original capital stock of the company. It was not subscribed in dollars and cents, but in so many million feet per year, practically in proportion of their holding in the company; that the method of scaling what is known as the pool logs, according to the full scale, is the result of an agreement between all the members of the Chippewa Logging Company and all of the stockholders.

"To which testimony so offered the defendants objected as immaterial."

To which rulings the plaintiff duly excepted.

266 XX.

The court erred in sustaining the defendants' objection to the following question put to the witness Artemus Lamb:

"Q. Would it be possible to make a fair adjustment between the Eau Claire and the Chippewa Falls members of the pool company, whose logs are taken out at Eau Claire and Chippewa Falls, and the down-river members of the company if the logs that come through above West Newton boom were scaled what is termed straight and sound—that is, by the individual scalers using their judgment in making such deductions as would be necessary to make the logs sound, merchantable logs?

"To which question the defendants objected as incompetent and immaterial and calling for the conclusion of the witness."

To which ruling the plaintiff duly excepted.

XXI.

The court erred in sustaining the defendants' objection to the following question put to the witness Artemus Lamb:

"How long has the business of these companies been conducted in the same way that it was conducted in 1893, prior to that time?

"To which question the defendants objected."

And in refusing to permit the plaintiff to show by this witness that the Mississippi River Logging Company had conducted the business in the same manner for 22 years, and that the pool had been in existence about 13 years up to that time.

Which testimony so offered was objected to by the defendants as immaterial.

To which rulings the plaintiff duly excepted.

XXII.

The court erred in sustaining the defendants' objection to the following question put to the witness Artemus Lamb:

"And were they handled in the same way there" (referring to Beef slough)?

To which ruling the plaintiff duly excepted.

267 XXIII.

The court erred in sustaining the defendants' objection to the following question put to the witness G. W. Cable:

"Q. Did your company (referring to the Cable Lumber Company) make some arrangement or agreement with the Mississippi River Logging Company to scale such logs as they might have coming through that boom that year?"

And in refusing to permit the plaintiff to show by this witness that before the business of assorting and rafting the logs at West Newton boom commenced in the summer of 1893 an arrangement was made between the Mississippi River Logging Company and the Cable Lumber Company by which the Mississippi River Logging Company agreed to scale all of the logs of the Cable Lumber Company for a fee which was agreed upon, and the Cable Lumber Company agreed that the Mississippi River Logging Company might scale them.

To which ruling the plaintiff duly excepted.

XXIV.

The court erred in sustaining the defendants' objections to the following question put to the witness Frank W. Mueller:

"Q. In 1893 and prior to that time where did you get your logs to manufacture?

"To which question the defendants objected as immaterial, because the deponent is not a party to any of these causes."

And in refusing to permit the plaintiff to show by this witness that all of the logs of the firm of C. Mueller & Sons during the year 1893 were cut on their own lands on the Chippewa river or bought on the banks of the Chippewa river and run down through this West Newton boom and taken to their mills at Davenport to be manufactured.

The plaintiff offered at the same time to follow that testimony up by the testimony of a large number of other witnesses that their logs came through in the same way, and by evidence showing that they were substantially all of the logs that did go through the boom.

To which ruling the plaintiff duly excepted.

268 XXV.

The court erred in sustaining the defendants' objection to the following question put to the witness D. J. Batcheldor, a member of the firm of Gardner, Batchelder & Wells, who had charge of their logging business during the year 1893:

"Q. Where did they get their logs?

"To which question the defendants objected as immaterial, because these parties are not parties to the suit in any way."

And in refusing to permit the plaintiff to show by this witness that all of Gardner, Batchelder & Wells' logs that were rafted from West Newton booms came out of the different tributaries of the Chippewa from different streams, and that that had been true for a number of years before 1893.

Which testimony so offered was objected to by the defendants as incompetent and immaterial.

To which rulings the plaintiff duly excepted.

XXVI.

The court erred in refusing to permit the plaintiff to show by this witness that substantially the same agreement was made between the firm of Gardner, Batchelder & Wells and the Mississippi River Logging Company with reference to the scaling of the logs of that firm that came through the West Newton booms in 1893 as was made with the Cable Lumber Company.

Which testimony was objected to by the defendants as immaterial.

To which ruling the plaintiff duly excepted.

XXVII.

The court erred in refusing to receive in evidence the depositions of William E. Sawyer, George H. Ray, and Lucius Coleman, for the purpose of showing that the logs of the Sawyer & Austin Lumber Company, of which Mr. Sawyer was secretary, and the logs of the Gem City Saw Mill Company and the Hannibal Saw Mill
269 Company, which were represented and controlled by the witness George H. Ray, and the logs of C. L. Coleman that came through the West Newton booms in 1893 were cut upon the Chippewa river and destined, all of them, to be taken to the saw-mills of the Sawyer & Austin Lumber Company at La Crosse, the Gem City Saw Mill Company at Quincy, Illinois, the Hannibal Saw Mill Company at Hannibal, Missouri, and the C. L. Coleman Saw Mill Company at La Crosse, Wisconsin; that each of those owners named made an agreement with the Mississippi River Logging Company to scale all of their logs that might come through those booms in that year by an agreement substantially similar to the agreement which had been testified to by Mr. Davidson and by several other witnesses, this testimony to be followed by testimony showing that the logs of those parties just named and of the other parties whose depositions have been excluded by the court were substantially all of the logs that came through the West Newton boom in 1893.

To which testimony and all thereof the defendants objected as immaterial and incompetent.

To which ruling plaintiff duly excepted.

XXVIII.

The court erred in sustaining the defendants' objection to the following question put to the witness John Paul, the president of the John Paul Lumber Company:

"Q. In and prior to the year 1893 what proportion of the logs that were sorted out and delivered to you at the sorting works were sold by you, and what proportion manufactured to your mills in La Crosse?

"Which question was objected to by the defendants as immaterial and incompetent."

And in refusing to permit the plaintiff to show by this witness that 90 per cent. of the logs referred to in the question were manufactured by the John Paul Lumber Company at La Crosse.

XXIX.

The court erred in sustaining the defendants' objection to the following question put to the witness F. Weyerhauser, the president of the Mississippi River Logging Company:

"Q. When the Mississippi River Logging Company was organized who were the members of it?

"Which question was objected to as immaterial."

And in refusing to permit the plaintiff to show by this witness that the members of the Mississippi River Logging Company, some eight or ten of them in all, were all lumbermen of manufacturers of lumber, residing or having their places of business in the States of Iowa, Illinois, and Minnesota, and that the purpose and the sole purpose of the organization was to facilitate and render less complicated the driving and handling of their logs after they were put into the Chippewa river, and perhaps the Black river, and that the general course of business of that company has always been substantially that all of the logs that were cut by or for the company were run down the Chippewa river, first, to Beef slough, and afterwards to West Newton slough when the work was moved over there; that the logs belonging to the company were all sorted and put in one place under one head, although there were a great many different marks, and that as fast as those logs were sorted out they were divided among the members and taken away by them to their several places of manufacture, according to the interest of each of the members in the company, which interest was determined by the amount contributed by each of the members in any one year to the fund of the company, which was used in acquiring the logs which it did acquire, and that the logs of the Mississippi River Logging Company and of the Chippewa Logging Company below Eau Claire constituted at least two-thirds of all the logs that came down that river in every year, including the year 1893.

Which testimony so offered was objected to by the defendants as immaterial.

To which ruling the plaintiff duly excepted.

271 XXX.

The court erred in sustaining the defendants' objection to the following question put to the witness F. Weyerhauser:

"Q. During the year 1893 and years prior to that time, as far back as 1889, you may state whether or not all of the logs that came out of the Chippewa river into the West Newton booms, outside of the logs that were owned by the Chippewa Logging Company and the Mississippi River Logging Company, came there under any agreement or arrangement with the several owners; and, if so, what the agreement was.

"Which question was objected to as immaterial."

And in refusing to permit the plaintiff to show by this witness that all of the logs that came down the Chippewa river, that did not belong to the Mississippi River Logging Company or to the Chippewa Logging Company, were turned over to the Mississippi River Logging Company, and there was an agreement by which the company was to drive the logs down the Chippewa, boom and assort them, and raft them and deliver them rafted to their respective owners at the foot of the West Newton boom.

Which testimony so offered was objected to by the defendants as incompetent and immaterial.

To which rulings the plaintiff duly excepted.

XXXI.

The court erred in sustaining the defendants' objection to the following question put to the witness John H. Mullen:

"Q. When you commenced scaling logs at West Newton, or your deputies did, in the spring of 1893, you did not have any record in your office of log marks, did you?"

And in refusing to permit the plaintiff to show by this witness that he did not have in his office, either at the time he commenced scaling or at any other time in 1893, any record of log marks which had been made in pursuance of the provisions of the statutes of this State.

Which testimony so offered was objected to by the defendants as immaterial.

272 To which rulings the plaintiff duly excepted.

XXXII.

The court erred in sustaining the defendants' objection to the question put to the witness Hugh Stewart, who produced a paper marked "Plaintiff's Exhibit F," a copy of which is attached to the bill of exceptions, and who testified that he made out the paper and that he got the dates and marks and the number of logs and number of feet set down thereon out of the May and June scale bills of the surveyor general—that is, Defendants' Exhibits 3 and 4—and that in the performance of his duties he saw every year all of the marks of the logs that were turned into the office at the West Newton booms by the various scalers.

"Q. Did you ever see any of the marks that are on this Exhibit F?"

And in refusing to permit the plaintiff to show by this witness that during all the time which he has been employed in the office of the West Newton booms he never saw any of the log marks set forth in Plaintiff's Exhibit "F;" this testimony to be followed by the evidence of the scalers for the Chippewa Logging Company that the logs were not in fact in the brails of logs in which they may appear to be by the tally-sheets in the surveyor general's office, and by the evidence of the men who had charge of the catch-marking of the logs, showing that these marks were marks that were not known to those booms, and that it was the duty of more than thirty men, if any such marks came to him, to tie it up with a line and hold it until his attention was called to it, to give directions where it should go.

To which rulings the plaintiff duly excepted.

XXXIII.

The court erred in sustaining the defendants' objections to the following question put to the witness Hugh Stewart:

273 "Q. Is there or has there been any attempt made on the part of owners of these stray logs to follow the logs themselves and take them out of the brails where they happened to be?

"Which question was objected to by the defendants as immaterial; to which ruling the plaintiff duly excepted.

XXXIV.

The court erred in sustaining the defendants' objection to the following question put to the witness Henry Phitts:

"Q. I show you Plaintiff's Exhibit 'F' and ask you to look at the marks upon that exhibit and see whether you ever saw any of them before."

And in refusing to permit the plaintiff to show by this witness that he never saw any of the marks on this Exhibit F, and that it would be impossible for the number of logs which is said to have been marked with these marks, which number exceeds a hundred, to have passed through this boom on any one day (as it appears from these scale bills offered in evidence that they did do) without the attention of this witness being called to it, and that they did not, in fact, pass through there.

Which testimony so offered was objected to by the defendants as immaterial and incompetent.

To which rulings the plaintiff duly excepted.

XXXV.

The court erred in sustaining the defendants' objection to the following question put to the witness James C. Daly:

"Q. Were the men who were employed under your supervision there men who had ever worked at scaling logs at West Newton or Beef slough?

"To which question the defendants objected as immaterial."

And in refusing to permit the plaintiff to show by this witness—

"That there were over thirty scalers employed by the de-
274 fendant Mullen to do the scaling at West Newton during the summer of 1893 and half as many tallymen, and that all the tallymen, with the exception of six, and all of the scalers were men who were inexperienced and had never had any experience in scaling logs at the West Newton booms, and that by reason of the great number of marks that are rafted together for the Chippewa Logging Company and the Mississippi River Logging Company it is impossible for an inexperienced scaler with an inexperienced tallyman to make any correct scale and return of the logs and the marks thereon, and that, as a matter of fact, the scales or pretended scales made there by the surveyor general's deputies were grossly inaccurate."

Which testimony so offered was objected to by the defendants as immaterial and incompetent.

To which ruling the plaintiff duly excepted.

XXXVI.

The court erred in sustaining the defendants' objections to the following question put to the witness Colin McMillan, and who testified that he had charge of one of the crews of men that were scaling at the West Newton booms in 1893 for the defendant Mullen:

"Q. State whether any of the men under you in scaling these logs scaled all logs 24 feet and over in length as two logs.

"Which question was objected to by the defendant as immaterial."

To which rulings the plaintiff duly excepted.

XXXVII.

The court erred in sustaining the defendants' objection to the following question put to the witness Hugh Stewart:

"Q. Have you made a computation for the purpose of being able to testify what proportion of the logs that came through the West Newton boom in the summer of 1893 and the years prior thereto belonged to parties who resided outside of either the State of Minnesota or Wisconsin?

275 "Which question was objected to by the defendants as immaterial."

To which ruling the plaintiff duly excepted.

XXXVIII.

The court erred in sustaining the objection of the defendants to the following question put to the witness Hugh Stewart:

"Q. Have you made a computation, so that you can testify as to the amount of logs that were rafted and scaled through the West Newton boom in the summer of 1893 that were not claimed by

anybody and that you had no means of knowing to whom they did belong?

"This question *on* being objected to by the defendants as immaterial, the court asked:

"How is that material?

"Plaintiff's counsel stated: It is material in this way: We expect to show by this witness that out of 500,000,000 of logs that came through that summer, all of the logs except 120,000 belonged to parties that were engaged in logging on the Chippewa river.

"And the court, after such statement, sustained the objection."

To which ruling the plaintiff duly excepted.

XXXIX.

This witness having testified that what are known as "pick-up logs" are logs that are picked up along the river below the West Newton booms, the following question was asked him:

"Can you tell how many logs other than those that were recognized as belonging to parties engaged in logging on the Chippewa river were picked up and scaled by the Mississippi River Logging Company between these West Newton booms and La Crosse during the summer of 1893?

"Plaintiff's counsel making in connection with this question the following statement: We think it is material upon this proposition: We have claimed, and shall claim, that substantially all logs, if not quite all of them (the amount is impossible to determine),
276 that go into the West Newton booms that do not come from the Chippewa river are logs that escaped from rafts while passing down the river from Lake Pepin to the upper limits of the West Newton boom; and this testimony is offered for the purpose of substantiating that claim, by showing that the proportion of that class of logs that are found below West Newton is larger in about the same proportion with those that come into or are rafter out of those booms, and that the difference between these two amounts is substantially like the difference between the mileage of the river from Lake Pepin to the West Newton booms and from the West Newton booms to La Crosse.

"This question was objected to by the defendants as immaterial, and the court sustained the objection."

To which ruling and order the plaintiff duly excepted, and now assigns such ruling as error.

XL.

The court erred in overruling the plaintiff's objection to the admission in evidence of the two pages of Plaintiff's Exhibit D which are marked "A" and "B," and are Exhibits "A 1" and "B 1" in the record.

To which ruling the plaintiff duly excepted.

XLI.

The court erred in refusing to make the first declaration of the law, as requested by plaintiff at the close of the testimony, as follows:

"That it has not been shown that the logs for which defendant claims fees for scaling in this cause ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed or to any lien on the plaintiff's logs therefor."

277 To which ruling the plaintiff duly excepted.

XLII.

The court erred in refusing to make the second declaration of law, as requested by the plaintiff at the close of the testimony, as follows, to wit:

"That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:"

"*a.* Because the scale bills, Defendants' Exhibits 3 and 4, are not evidence of the scaling of the logs therein described.

"*b.* Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district.

"*c.* Because it appears that a very great proportion of the logs mentioned in these scale bills, Defendants' Exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else.

"*d.* Because the pretended records of said scale bills were not in fact any record whatever.

"*e.* Because it does not appear that any of the log marks shown on defendants' scale bills, Exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the 4th district of the State of Minnesota in accordance with the provisions of title 3 of chapter 32, General Statutes of the State of Minnesota."

To which ruling the plaintiff duly excepted.

XLIII.

The court erred in refusing to make the third declaration of law requested by the plaintiff at the close of the testimony, as follows, to wit:

278 "That the statute under which the defendants claim a right to scale these logs and recover fees therefor and to a lien on the plaintiff's logs therefor is, as applied to the place and business where this scaling was done, an attempted regulation by the State of interstate commerce, and is unconstitutional and void, being in contravention of subdivision 4 of section 8 of article 1 of the Constitution of the United States."

To which ruling the plaintiff duly excepted.

XLIV.

The court erred in entering judgment in favor of the defendants and against the plaintiff.

MOSES E. CLAPP,
Attorney for Plaintiff in Error.
THOMAS SIMPSON,
N. H. CLAPP,
Of Counsel for Plaintiff in Error.

(Endorsed:) Assignments of error. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

279 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

Know all men by these presents that we, Lindsay & Phelps Company, a corporation, of Davenport, in the State of Iowa, and Matthew G. Norton, of Winona, Minn., and Frederick Weyerhauser, of the city of St. Paul, in the State of Minnesota, are held and firmly bound unto John H. Mullen and the State of Minnesota in the full and just sum of forty thousand dollars ($40,000.00), to be paid to the said John H. Mullen and the State of Minnesota, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of January, in the year of our Lord one thousand eight hundred ninety-eight.

Whereas lately, at the general July term of the circuit court of the United States for the district of Minnesota, third division, in a suit depending in said court between the said Lindsay & Phelps Company, plaintiff, and John H. Mullen and The State of Minnesota, defendants, judgment was rendered on the 19th day of August, A. D. 1897, against the said plaintiff in favor of the said defendants, and the said plaintiff has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant-, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the date of said citation:

Now, the condition of this obligation is such that if the said Lindsay & Phelps Company, plaintiff in error, shall prose-
280 cute said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; else to remain in full force and virtue.

In witness whereof said Lindsay & Phelps Company has caused these presents to be signed by its president, countersigned by its secretary, and its corporate seal to be hereunto affixed, and the said

Matthew G. Norton and F. Weyerhauser have hereunto set their hands and seals this 3rd day of January, A. D. 1898.

LINDSAY & PHELPS COMPANY,
By J. E. LINDSAY, *President.*

[CORPORATE SEAL.]

Countersigned:
J. B. PHELPS, *Secretary.*

In presence of—
GEO. F. LINDSAY,
HENRY HASKIN,
As to J. E. Lindsay.
B. W. BAWDEN,
WILLIAM POTTER,
As to J. B. Phelps.
W. HAYES LAIRD,
FRED S. BELL,
As to— MATTHEW G. NORTON. [SEAL.]
A. E. MACARTNEY,
N. H. CLAPP,
As to— F. WYERHAUSER. [SEAL.]

281 STATE OF IOWA, } ss:
County of Scott, }

On this 4th day of January, 1898, before me appeared J. E. Lindsay and J. B. Phelps, to me personally known, who, being each by me duly sworn, did say that the said J. E. Lindsay is the president and that the said J. B. Phelps is the secretary of the Lindsay & Phelps Company, the corporation above named, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said J. E. Lindsay and J. B. Phelps acknowledged said instrument to be the free act and deed of said corporation.

CHARLES DAVISON,
[NOTARIAL SEAL.] *Notary Public, Scott County, Iowa.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 3rd day of January, A. D. 1898, before me personally appeared Frederick Weyerhauser, to me well known to be one of the persons named in and who executed the above and foregoing instrument, and acknowledged the execution thereof to be his free act and deed.

A. E. MACARTNEY,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

282 STATE OF MINNESOTA, } ss:
County of Winona, }

On this 6th day of January, A. D. 1898, before me personally appeared Matthew G. Norton, to me well known to be one of the

persons named in and who executed the above and foregoing instrument, and acknowledged the execution thereof to be his free act and deed.

FRED S. BELL,
Notary Public in and for Winona Co., Minn.

[NOTARIAL SEAL.]

STATE OF MINNESOTA, } ss:
County of Winona, }

Matthew G. Norton, being by me first duly sworn, deposes and says that he is one of the sureties named in and who executed the above and foregoing bond; that he is a resident and freeholder of the county of Winona, in the State of Minnesota, and worth the sum of forty thousand dollars ($40,000.00) over and above all his just debts and liabilities and exclusive of property exempt by law from seizure or sale on execution or attachment.

MATTHEW G. NORTON.

Subscribed and sworn to before me this 6th day of January, A. D. 1898.

FRED S. BELL,
Notary Public, Winona County, Minn.

[NOTARIAL SEAL.]

283 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Frederick Weyerhauser, being by me first duly sworn, deposes and says that he is one of the sureties named in and who executed the above and foregoing bond; that he is a resident and freeholder of the county of Ramsey, in the State of Minnesota, and worth the sum of forty thousand dollars ($40,000.00) over and above all his just debts and liabilities and exclusive of property exempt by law from seizure or sale on execution or attachment.

F. WEYERHAUSER.

Subscribed and sworn to before me this 3rd day of January, A. D. 1898.

A. E. MACARTNEY,
Notary Public, Ramsey County, Minnesota.

[NOTARIAL SEAL.]

The above and foregoing bond is hereby approved both as to form and sureties.

WM. LOCHREN,
District Judge.

Dated January 8th, 1898.

(Endorsed:) Supersedeas bond. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

284 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

Petition for Writ of Error.

And now comes Lindsay & Phelps Company, plaintiff in error, and says that on the 19th day of August, A. D. 1897, this court entered judgment herein in favor of the above-named defendants, John H. Mullen and State of Minnesota, defendants in error herein, against this plaintiff in error, Lindsay & Phelps Company, for the return of the following-described property, to wit:

One full brail of pine logs, numbered 2222, containing 1,064 logs, which scale 134,160 feet;

One full brail of pine logs, numbered 2228, containing 1,007 logs, which scale 132,120 feet;

One full brail of pine logs, numbered 2272, containing 1,071 logs, which scale 133,650 feet;

One narrow brail of pine logs, numbered 1030, containing 596 logs, which scale 70,650 feet;

One narrow brail of pine logs, numbered 7337, containing 658 logs, which scale 68,130 feet;

One full brail of pine logs, numbered 2304, containing 1,046 logs, which scale 138,230 feet;

One full brail of pine logs, numbered 2407, containing 1,004 logs, which scale 143,270 feet;

One full brail of pine logs, numbered 2387, containing 1,020 logs, which scale 141,380 feet;

One full brail of pine logs, numbered 2470, containing 990 logs, which scale 144,270 feet;

285 & 286 Or, in case of the failure to return said property, for the sum of fifteen thousand six hundred thirty-two dollars and thirteen cents ($15,632.13), with costs and disbursements, to be taxed; in which judgment and the proceedings had prior thereunto in this case certain errors were committed to the prejudice of this plaintiff in error, all which will more in detail appear in the assignments of errors which are filed with this petition.

Wherefore this plaintiff in error prays that a writ of error issue in its behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to said Supreme Court of the United States.

MOSES E. CLAPP,
Attorney for Plaintiff in Error.
THOMAS SIMPSON,
N. H. CLAPP,
Of Counsel for Plaintiff in Error.

Dated this 6th day of January, 1898.

Petition granted and writ of error allowed upon giving bond for damages and costs in the sum of forty thousand dollars.

WM. LOCHREN,
District Judge.

(Endorsed:) Petition for writ of error and allowance. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

287 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Minnesota, third division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Lindsay & Phelps Company, plaintiff, and John H. Mullen and The State of Minnesota, defendants, a manifest error hath happened, to the great damage of the said plaintiff, Lindsay & Phelps Company, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on or before the 7th day of February, A. D. 1898, to the end that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of said Supreme Court, this 8th day of January, in the year of our
288 Lord one thousand eight hundred and ninety-eight.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Allowed by—
WM. LOCHREN,
District Judge.

288½ [Endorsed:] Ent'd. 1153, E. law. Original. U. S. circuit court, district of Minnesota, third division. Lindsay and

Phelps Company, plaintiff in error, *vs.* John H. Mullen and The State of Minnesota, defendants in error. Writ of error. Due and personal service of the within — is hereby admitted this — day of ——, 189-. —— ——, attorney for ——. Thomas Simpson, Clapp & Macartney, attorneys for plaintiff in error, 24–27 National German-American Bank bldg., St. Paul, Minn. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

289 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

UNITED STATES OF AMERICA, *ss:*

To John H. Mullen and the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, third division, wherein Lindsay & Phelps Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of January, in the year of our Lord one thousand eight hundred ninety-eight.

WM. LOCHREN,
District Judge.

290 [Endorsed:] Ent'd. 1153. E. law. Original. U. S. circuit court, district of Minnesota, third division. Lindsay and Phelps Co., plaintiff, *vs.* John H. Mullen and The State of Minnesota, defendants. Citation on writ of error. Due and personal service of the within citation is hereby admitted this 10th day of Jan., 1898. H. W. Childs, att'y general, attorney for *att'y for* def'ts. Thomas Simpson, Clapp & Macartney, attorneys for plaintiff, 24–27 National German-American Bank bldg., St. Paul, Minn. Filed Jan'y 10th, 1898. Henry D. Lang, clerk.

Received a copy of the within citation at St. Paul, Minn., this 10th day of January, 1898.

WARNER, RICHARDSON & LAWRENCE,
Attorneys for Defendants.

291 United States Circuit Court, District of Minnesota, Third Division.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error. } At Law.

The plaintiff above named having taken a writ of error to the Supreme Court of the United States to reverse the judgment rendered in this action, and it appearing to the court that it is necessary and proper that the originals of Defendants' Exhibit 3 and Plaintiff's Exhibit D, referred to in the bill of exceptions signed and settled in said cause, should be inspected in the Supreme Court upon said writ of error, it is therefore—

Ordered that the said original papers and exhibits be filed with the clerk of this court, and that upon making his return to the writ of error aforesaid said clerk transmit by express to the clerk of the Supreme Court the said original papers, and that said original papers remain in the custody of the clerk of the Supreme Court until the hearing therein upon said writ of error, to the end that upon such hearing said original papers may be inspected by the Supreme Court, and that said papers remain in the custody of said clerk of the Supreme Court until the further order of that court in the premises.

WM. LOCHREN, *Judge.*

Dated January 8th, 1898.

(Endorsed:) Order to send up certain original exhibits. Filed Jan'y 8th, 1898. Henry D. Lang, clerk.

292 UNITED STATES OF AMERICA:

CIRCUIT COURT OF THE UNITED STATES, *District of Minnesota,* } ss:

I, Henry D. Lang, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 291 pages, numbered consecutively from 1 to 291, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 26th day of January, in the year of our Lord one thousand eight hundred and 98, and of the Independence of the United States the one hundred and 22nd year.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

HENRY D. LANG, *Clerk.*

293 Supreme Court of the United States.

LINDSAY & PHELPS COMPANY, Plaintiff in Error,
vs.
JOHN H. MULLEN and THE STATE OF MINNESOTA, Defendants in Error.

The parties to the above-entitled cause hereby stipulate that the following portions of the record returned in the above-entitled cause shall constitute the printed record, viz:

The complaint.
The writ of replevin and marshal's return thereon.
The answer of J. H. Mullen.
The reply.
The answer of the State of Minnesota.
The judgment.
The petition for a new trial.
The bill of exceptions and exhibits attached thereto.
The order denying the motion for a new trial.
The assignments of error.
The petition for writ of error.
The writ of error and citation.
The order to send up original exhibits, Defendants' Exhibit 3 and Plaintiff's Exhibit D.

MOSES E. CLAPP,
Attorney for Plaintiff in Error.
HENRY W. CHILDS,
Attorneys for Defendants in Error.

294 (Endorsed:) Case No. 16,791. Supreme Court U. S., October term, 1898. Term No., 239. Lindsay & Phelps Co., pl'ff in error, *vs.* John H. Mullen *et al.* Stipulation as to what shall constitute the printed record. Filed August 20, 1898.

Endorsed on cover: Case No. 16,791. Minnesota C. C. U. S. Term No., 239. Lindsay and Phelps Company, plaintiff in error, *vs.* John H. Mullen and The State of Minnesota. Filed February 7th, 1898.

Supreme Court of the United States.

LINDSAY & PHELPS COMPANY,

Plaintiff in Error.

vs.

JOHN H. MULLEN, and the STATE OF MINNESOTA,

Defendants in Error.

ARGUMENT IN OPPOSITION TO MOTION TO ADVANCE CAUSE.

Briefly stated, this motion rests upon these facts:

Prior to 1893, a company known as the Mississippi River Logging Company, located and constructed assorting booms at a point on the Mississippi river in Minnesota, known as West Newton, to receive logs cut on the Chippewa river and its tributaries in the state of Wisconsin. The logs come into this boom in a common mass, and are then assorted, put in rafts, and delivered to the owners at the foot of the boom, thence taken to points in the various states for which they are destined.

Also prior to 1893, a law was passed by the legislature of Minnesota, creating lumber districts and providing for the appointment of surveyors general, who were to be paid, not

by the state, but by fees collected from log owners. The general terms of this law are set out in the motion papers.

In April 1893 John H. Mullen was appointed surveyor general for the district in which the so-called West Newton booms are situate, and it is claimed that during the season of 1893 said Mullen scaled large quantities of logs, among others, logs belonging to the plaintiff in error. His fees not being paid, he proceeded to sell the logs of the plaintiff in error, and it brought replevin, which is the suit at bar.

In the winter of 1895, the claim not having been paid, the legislature of Minnesota generously appropriated to Mr. Mullen a large sum of money, conditioned upon his selling and assigning his claim, or alleged lien, to the state. This was done, and the state having thus embarked in the brokerage business, was, at its own request, made a party to the replevin suit, in which it seeks to collect its claim so purchased of Mullen.

Under the law providing for the purchase of this claim of Mullen by the state, the state is to pay back to Mullen all it collects in excess of the amount paid to Mullen for the claim.

Counsel for defendants in error states that this motion is based upon,

1st: Section 949 of the revised statutes of the United States; and,

2nd: Rule 26 of the supreme court, subdivision 7.

Upon the point that the state is a party, counsel admits —as he necessarily must—that the execution of the revenue laws of the state, is not interfered with, but that the state is a party within the meaning of section 949, and that such fact, coupled with the circumstances of the case, entitles the state to have the cause advanced.

As we read section 949, the fact that the state is a party, is immaterial, unless the revenue laws of the state are being interfered with, and that to an extent that seriously embarrasses the administration of the state affairs. That is,

the case must be one where the collection of state revenue is being enjoined, or stayed, to the serious embarrassment of the state, and the state is a party.

Carter vs. Greenhow, 109 U. S. 64.

The mere fact that the execution of the revenue laws is enjoined, does not entitle the case to be advanced, unless it sufficiently appears that the operation of the government of the state will be embarrassed.

Hoge vs. Richmond, 103 U. S., 1.

That there must be an interference with the operation of the revenue laws to the extent of embarrassing the administration of the affairs of the state, and the state must be a party, is clearly sustained by the language of the court in,

Central Railroad vs. Bourbon County, 116 U. S., 538.

We do not think it was ever claimed before, that a party could have a suit advanced, a suit brought to recover,—or a suit in which a party was seeking, as assignee, to enforce—a claim or lien, just because the party happened to be a state. Suppose the state had never become the assignee of Mullen's alleged lien, and the contest were one between Mullen and the plaintiff in error, would it be suggested for one moment that Mullen could have his suit advanced? Was it ever contemplated that section 949 applied to a suit where a state, as assignee of a chose in action was seeking to recover a part of such chose in action? And yet, that is the logic of counsel's contention so far as it is based upon the statute.

SPECIAL AND PECULIAR CIRCUMSTANCES.

We must admit that the purchase of an alleged lien by a state, and an agreement to attempt its enforcement, and turn back to the assignor all recovered over the amount paid by the assignee, presents a case of special and peculiar circumstances, but not of the nature contemplated by subdivision 7 of Rule 29.

Counsel for defendants in error does not claim that the state is interested any further than, as an alleged creditor, it is interested in the collection of its debt. Nor is there the slightest suggestion that the people of the state, aside from log owners whose logs go through the boom, are in any way interested, beyond the fact that if the state fails to collect its claim, the tax payers will be out that amount; in other words, there is no claim that the general public has the slightest interest in the enforcement or upholding of the law in question. Aside from the state attempting to collect an alleged debt, in this suit, there is no public interest involved. The surveyor general and the log owners are the only ones interested in upholding the validity of this law, and counsel practically concedes that the log owners alone are interested and claims that the law was passed for their protection.

If, in this case, the Boom Company were a party, and the evidence disclosed the fact that the log owners, generally, were hostile to the boom company, and desirous of upholding the law, counsel's claim would have some support, although that would not make the case of sufficient public importance to justify advancing it; but the evidence does not disclose any such condition; on the contrary, it discloses an effort on the part of the log owners to establish a system for the scaling and booming of their logs, and in this suit, to relieve themselves of the burden, annoyance and expense of the interference by the surveyor general, and that their system of managing the booms is quite sufficient to protect their individual interests.

It appears that the Minnesota Boom Company, is a mere name; that the real owners and operators of the booms are the Mississippi River Logging Company and the Chippewa Logging Company (Douglas, pages 56-7, Smith pages 63-4 of record), and that these two companies own two-thirds of the logs coming through the boom.

Plaintiff in error offered to show (page 93) by the evidence of Mr. Weyerhaeuser, that the Mississippi River Logging Company is composed of a number of lumbering interests lumber-

ing on the Chippewa river above the boom in question, and that that company and the Chippewa Logging Company owned about two-thirds of all the logs passing through the boom in 1893.

Plaintiff in error offered to show (page 94 of record) that the owner of all the other logs passing through the booms, including the plaintiff in error, agreed with the Mississippi River Logging Company and the Chippewa Logging Company to sort, scale and deliver their logs.

The plaintiff in error then offered to show (page 102) that of the 500,000,000 feet put through in 1893, all but 120,000 feet came from the Chippewa river and consequently were covered by the management of the boom, or owned by parties to the agreement referred to.

We assume that these offers could have been proven had not the defendants in error objected, and the court sustained the objection, and it comes now with poor grace from the defendants in error, after successfully objecting to our showing these facts, viz., that substantially all the log owners were interested in the operation of the booms as they were operated, to claim the very reverse, and insist that the owners required protection at the hands of the state.

If anything more is required to show your Honors that the log owners are not desirous of the alleged protection, but really desirous to be relieved of the annoyance, burden and cost of the interference by the surveyor general, we refer your Honors to the admission of the defendants in error, page 33:

"Whereupon the defendants admitted in open court, that no request was ever made by the plaintiff, or any one else, that the surveyor general should scale any of the logs running through the boom at West Newton, in 1893."

We might suggest that this admission relates to 1893, because the case involves the alleged scaling for that year.

We have a case, then, where the only interest the state has, is as assignee of a chose in action, to enforce the

collection thereof; the public has no interest whatever, except so far as it may be a simple creditor; and the log owners, in whose interest and for whose protection it is claimed the law was passed, not only are not asking for its enforcement, but opposing its enforcement, upon the ground that it is a useless, expensive interference with their business, and of no benefit to any one except the surveyor general.

We respectfully submit that the case should not be advanced.

Wm. E. Clapp

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1898.

LINDSAY AND PHELPS COMPANY,

Plaintiff in Error,

vs.

JOHN H. MULLEN and the STATE OF MINNESOTA,

Defendants in Error.

In Error to the Circuit Court of the United States for the District of Minnesota.

STATEMENT OF THE CASE.

This action is replevin. It was brought in August, A. D. 1893, against the defendant in error Mullen, by the plaintiff in error to recover the possession of certain pine saw logs cut upon the Chippewa river in the State of Wisconsin, and on their way to Davenport, Iowa, where the plaintiff in error owned and operated a saw mill; which logs plaintiff claimed to own, and which defendant Mullen had seized. The only right or title claimed by Mullen to the logs, was by virtue of a lien upon them for scaling these logs, and a large number of others belonging to other parties, which lien he claimed under and by virtue of certain statutes of the state of Minnesota hereinafter referred to.

The complaint, after the jurisdictional allegations alleges plaintiff's ownership and right of immediate possession of the

property (describing it,) that it is wrongfully detained by defendant, and the value of the property which is alleged to be $15,000. (Printed record page 1.)

On this complaint a writ of replevin was issued and the property taken by the marshal and delivered to plaintiff (printed record page 2 and 3.)

The answer of the defendant Mullen puts in issue plaintiff's ownership and right of possession of the logs, and their value as alleged in the complaint. It then sets up, in substance,

1. That the defendant was, during the year A. D. 1893, surveyor-general of logs and lumber of the fourth lumber district of Minnesota.

2. That ever since April 16th, 1889, the "Minnesota Boom Company," hereinafter, for brevity, called "Boom Company," had been a corporation duly organized, created, and existing and *chartered* under and by virtue of the laws of the state of Minnesota; that the general nature of the business of said Minnesota Boom Company is and was at all the times herein mentioned, the construction, maintenance and use of booms, dams, and other structures of any kind necessary or advantageous to the performance of the logging and lumbering business upon the Mississippi river, or either branch thereof; also upon or on any side or bank of any slough, bayou, branch, or part of said Mississippi river; also covering the gathering, driving, booming, storing, assorting, rafting, brailing, and otherwise handling logs, lumber and timber of any kind for itself and for any and all persons having logs, lumber or timber upon the waters of said river between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also at divers and sundry other places. That this boom company, acting under and by virtue of its *charter duly issued and granted to it by the state of Minnesota*, built, constructed and maintained, prior to and in the year 1893, a large number of booms within the limits of a slough called "West Newton Slough", branching off from the Mississippi river, which slough is wholly within the fourth lumber district of the state of Minnesota, and within the territory describ-

ed in the Boom Company's charter as above set forth, these booms being so built and maintained for the purpose of collecting, gathering, storing, assorting, brailing, rafting and handling logs, timber and lumber as they should come down the Mississippi river from points above in the ordinary course of business. That a large quantity of logs annually pass down the said Mississippi river into and through said fourth district, which logs belong to many different owners, the ownership being in all cases indicated by different marks cut into or upon the logs.

"*That there are and for many months prior to the 17th day of April, 1893, have been and ever since that time have been on file and of record in the office of this defendant, as surveyor general as aforesaid, under and pursuant to the statutes of the state of Minnesota in such case made and provided, several hundred different marks, each of a peculiar and unique character, but distinguishable one from the other and indicating said different ownerships.*"

That the character of the logging business in Minnesota and adjacent states is and has been of such a nature that such log marks are the only way of distinguishing the separate property of the different log owners, and that the logs bearing all these different marks necessarily become intermingled.

That in the practical operation of the business of logging and lumbering, it has been found, as the fact is, that the logs of different owners become intermingled by reason of accident, storms, carelessness, *and particularly the efforts of wrong-doers, who, for the purpose of depriving the true owners of their property and their rights in and to the same, take advantage of the unique nature of the property and seek to and do intermingle the said logs belonging to any one person, firm or corporation, whose property they seek to take or control, with the logs of others.* And that it is neccessary, when logs become intermingled that some person or corporation must assort and separate them; and it is for the purpose of so assorting and separating the logs of the different owners that the Boom Company has built, and maintained, its booms above mentioned, and these booms are properly located and constructed for the purpose of gathering and assorting all the logs that come down the river to that point.

That during the season of 1893 over 500,000,000 feet of logs were passed through these booms, and necessarily they were passed through very fast in order to dispose of them while the season lasted.

That the state of Minnesota, *for the purpose of protecting the people thereof and their rights in and to their property in logs*, and for the purpose of preventing fraud, conversion and wrong-doing, in respect to the selling, handling, booming, measuring, brailing, rafting, gathering and storing of said logs and the ownership thereof, has passed wise and salutary laws for the inspection, scaling and surveying of logs, *and has provided for the keeping of proper public records in respect to the same and the ownership thereof*, and the marking, scaling, surveying and the inspection thereof, and for the better accomplishment of said purposes, and each of them, has divided said state into several districts, and has provided for the appointment of surveyors general in each of said districts to take charge of, measure, and control such inspection, scaling and surveying and has made it the express duty of said surveyors general and each of them, including the defendant Mullen, to inspect, survey and scale logs in the manner provided by law and for the purposes aforesaid, *and has made it the express duty of this said defendant to inspect, survey and scale all logs which might at any time come into the booms of the said Minnesota Boom Company* in said West Newton Slough, as hereinbefore set forth.

It is then alleged, in substance, that where the scaling of the logs is done by the employes of the Boom Company, the amount of the logs sometimes by mistake, and sometimes wilfully, is misrepresented for the interest of the log owners who control the Boom Company.

That the only way to prevent such errors and mistakes as herein set forth, whether the same be intentional or otherwise, and to obtain a true and correct scale of logs passing through said booms, is to have a scale and survey made thereof by some competent, responsible, and disinterested person, whose duty it is to make the same carefully and correctly, and that, realizing this fact, the legislature of the said state has duly passed said laws in relation to surveying and scaling, as herein-

before referred to, by which it is made the express duty of this defendant in his district, and other surveyors general in their respective districts, in said state, to make an official scale and survey of logs coming into such boom or booms of a similar nature within their respective districts, and furthermore, *to keep a true and correct public and official record of all acts done and proceedings had and taken in connection with such scaling*, and that said law has in all respects proved to be of great benefit to the people of this state and of other states.

That all the logs which passed through said booms including plaintiff's logs, were cut on the Mississippi river and its tributaries, and in the ordinary course of business float down the river, and it is necessary that they should be gathered together in some one place and there assorted, brailed and delivered to their respective owners, and scaled, surveyed, measured and inspected, for the purpose, among other things, as aforesaid, of ascertaining the amount of merchantable lumber in each log contained *and keeping a true and correct record, description, and account thereof*, and the ownership and possession thereof for the benefit of the owners thereof. That the booms so maintained by the Boom Company have been recognized and selected as a safe and proper place to handle, assort and measure the logs, and when the owners, including the plaintiff, cut their logs and put them afloat, they knew they would go into these booms for the purposes aforesaid. That the logs ran into and through these booms in such large quantities and with such a diversity of ownership, that it was impossible for defendant to scale them all himself, and he had to employ a large number of deputies and make considerable expenditures of money in order to scale them.

3. That in May 1893 defendant scaled 38,716,510 feet of the logs running out of said boom *in the manner provided by law*, and at the end of said month this defendant duly made out and delivered to the owners of said boom and the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs so surveyed and measured, the marks thereon, respectively, and the number of feet of each mark so surveyed during said month and duly signed the

same under his hand and seal, *and thereupon immediately recorded such bill in the books of his office kept, as aforesaid, all in the manner provided by law*, and before the delivery of such scale bill, as aforesaid, and for the purpose of securing to this defendant the payment of his fees, as provided by law, this defendant duly affixed to said scale bill a true statement of the amount due him thereon, to-wit, the sum of $1,935.32, and that he scaled such logs relying upon such lien, and that he claimed a lien thereon for such amount and the costs of collection. And that he took the logs in question and detained them to secure and enforce payment of his lien therefor.

The answer admits the taking of the several brails of logs mentioned in the complaint, but denies the number of logs and feet as set forth in the complaint. The answer then alleges the manner in which the scaling was done, reciting substantially the requirements of the statutes of Minnesota in that regard; one of the allegations being:

"That every log surveyed by him as aforesaid was so surveyed by the largest number of even feet which it contained in length over ten feet and under twenty-four feet, *and all logs of 24 feet length or more were duly surveyed by him as two logs or more.*"

A similar allegation is made as to scaling 183,062,290 feet of logs in June.

The prayer for judgment is for a return of the property or for the value of the defendant's special property, therein, viz., $12,197.81 and interest (printed record pages 4 to 12.)

A reply to this answer was interposed, in accordance with the state practice. This reply admitted the existence of the West Newton Slough, as alleged in the answer, and that many logs pass through the same annually in great numbers and of many different marks, and many of them are there brailed and rafted as in the reply set forth.

The reply then sets forth that plaintiff is a saw mill owner on the banks of the Mississippi in Iowa, and plaintiff, in common with a number of other saw mill owners along the Mississippi below the mouth of the Chippewa, in Minnesota,

Wisconsin, Iowa, Illinois and Missouri, have found it necessary to secure their supply of logs for manufacture on lands in Wisconsin adjacent to the Chippewa river, from whence they are floated and transported to the mills of the respective owners. It is not practicable to float them down the Chippewa otherwise than loose, nor down the Mississippi otherwise than in rafts or brails, and it has been found more economical for all the owners to co-operate in the business of driving and transporting their logs. In order, therefore, to facilitate and expedite the floating and transportation of their log products to their destination, and solely to aid in the speedy, economical and uninterrupted transportation of the logs from the place where they are cut in Wisconsin to their destination in the several states mentioned, certain of the saw mill owners some years before 1893 organized a corporation in the state of Iowa known as the Mississippi River Logging Company, hereinafter, for brevity, called Logging Co. This Logging Company caused the Boom Company to be organized, hoping to secure authority and sanction from the United States to the Boom Co. to maintain and operate its boom in West Newton Slough, but such authority or sanction was never obtained, and all the booms erected in the name of the Boom Company were in fact erected and are, together with all riparian and other rights there, owned by the Logging Company, and are only maintained by the sufferance of the United States, and are subject to be removed at any time. That neither the said Boom Company nor said Mississippi River Logging Company, nor anyone has ever had any legal right or authority to drive or float into said slough or arm of the river, or to there keep, detain, or hold, in any boom or otherwise, or to there brail or raft any logs of any other person without such person directing or authorizing them so to do or consenting thereto.

To secure further co-operation of logowners, and further facilitate the business, the Logging Company and certain saw mill owners at Eau Claire on the Chippewa, organized another corporation in Wisconsin, known as the Chippewa Logging Company; this latter company purchases all the logs for its respective stockholders, and then divides up the logs so

purchased among its members at Eau Claire, on the Chippewa, and below on the Mississippi, in accordance with an agreed plan, a part of which plan provides for a method of measurement to determine how many logs each member does in fact receive. The arrangements of the Logging Company and the Chippewa Logging Company having been found to be great aids in the speedy and economical transportation of the logs down said rivers, certain individual saw mill owners, at times, hired the said Logging Company to drive or transport logs owned by them down said river to their respective mills. And plaintiff had made an agreement with the Logging Company to drive plaintiff's logs, including those in question, down the Chippewa and to West Newton Slough, and there brail, raft and deliver them to the plaintiff, all of which the Logging Company did, and the logs so delivered are the logs in question in this suit. When the logs were put in the Chippewa River it was expected by all parties interested in them, that they should be, and but for defendant's illegal seizure and detention they would have been, floated and transported to the mills at which they were to be manufactured without delay, stoppage or interruption, except so far as the same might be necessary, to do such acts as should be required in order to float, drive, or transport them safely and expeditiously to their destination. That of all the logs passing through said West Newton slough, at least ninety-nine per cent were and are floated out of said state of Wisconsin down said Chippewa river, and at least eighty per cent thereof were and are destined for and floated or transported to points outside of said states of Wisconsin or Minnesota.

That defendant claims to have been at all the times referred to, one of the surveyors of logs of the state of Minnesota, appointed for the district of which the county of Wabasha is a part, and claims to have scaled or measured said logs, and he took possession of them and held and claims the right to hold them, not only for the fees which he alleged were due for scaling them, but also for the fees which he claimed to be due for the scaling of many millions of feet of other logs in said slough.

That neither the plaintiff, nor anyone having any interest in or control, or dominion over, or any right to such control or dominion of said logs, requested or authorized defendant to measure or scale the same or consented that he should do so, nor did nor does any law of the state of Minnesota give him any right or authority to scale or measure them or any logs passing through said West Newton slough or give him any lien upon them for scaling or measuring them or for scaling or measuring any other logs, nor under the laws or constitution of the United States had or has the state of Minnesota any right, authority, or power nor could it have any authority or power to authorize the defendant or any other state officer, to scale or measure said logs at the expense of the plaintiff or to obtain a lien upon them or detain or hold them for such scaling; that the transporting of such property from one state to another is commerce between the states, and therefore can only be regulated by Congress, and no state can legally in any manner interrupt or interfere with or burden or tax the same.

That the said Chippewa river and the said Mississippi river are, and each of them is navigable waters of the United States, and have been taken control of and are, and for many years last past have been, regulated and improved at great expense by the United States, and the said arm of the Mississippi river called West Newton Slough, is a navigable arm of said river, and neither the state of Minnesota nor any other state past which said Mississippi river flows had or has any right to interfere with the navigation or improvement thereof.

The reply puts in issue, by a general denial, all the allegations of the answer, except as admitted or qualified in the manner above set forth (See printed record pages 13 to 16).

The cause was tried before the court, a jury having been waived by written stipulation.

When the cause was called for trial, the state of Minnesota by its attorney general, appeared and asked that the state be made a party to the action, stating that the state claimed as assignee of Mullen.

Counsel of the plaintiff consented to the granting of said motion, provided the fact that the state of Minnesota has been

made a defendant shall not in any way prejudice any rights that the plaintiff might have in this case if the state of Minnesota had not been made a defendant.

The Court: The state, I suppose, has no claim except as the assignee of the defendant?

Mr. Childs: That is all, as I understand it. I appear for the state and Mr. Edgerton also.

The Court: You may file such papers as are necessary to carry this agreement into effect.

Thereupon the attorney general, on behalf of the defendant state of Minnesota, made and filed the following answer:

STATE OF MINNESOTA.

UNITED STATES CIRCUIT COURT,

THIRD DIVISION.

LINDSEY & PHELPS COMPANY, a corporation, plaintiff,

vs.

JOHN H. MULLEN, Defendant.

Now comes the state of Minnesota and for answer to the complaint of the plaintiff in the above entitled action adopts the answer of the defendant Mullen as its answer, so far as applicable.

Further answering, the state of Minnesota alleges that on the 12th day of February, A. D. 1895, the said defendant, Mullen, duly assigned, transferred, and delivered to the state of Minnesota all his right, claim, and interest in said cause of action against the said plaintiff, and his right to the property described in plaintiff's complaint; that ever since said date the state of Minnesota has been the owner and holder of said claim, interest, right, and title to the property described in the complaint by virtue of said assignment, and is still the owner thereof; that no part of the fees for services rendered, which are fully set forth in the defendant's answer, have been paid to the state of Minnesota.

Wherefore, the state of Minnesota demands judgment for the return of said property, or if that cannot be had, that it

recover from said plaintiff the sum of $12,197.81, with interest, together with the costs and disbursements.

H. W. CHILDS,
Attorney General, and
GEO. B. EDGERTON,
Attorneys for State of Minnesota.

(Printed record pages 21 and 22.)

It will be seen that the pleadings in this case, as well as the evidence and rulings preserved in the bill of exceptions, present three main propositions of law:

First: The defendants contend and the plaintiff denies, that the logs in question, and the other logs for which the defendants claim fees for scaling, were run through a boom "chartered by the laws of the state of Minnesota." The defendants must base their claim for fees of defendant Mullen for scaling these logs and for a lien upon the following laws of the state of Minnesota, viz.:

Section 2 of Chapter 221 of the laws of the state of Minnesota for the year 1889, which is as follows:

> "Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing slough, erecting sluice ways, booms of all kinds, side, rolling sluicing and flooding dams or otherwise if necessary. but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render

driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber, reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for which same was incurred, and may seize, in whoever possession found, and hold a sufficient amount thereof to pay the same, and make sale thereof upon giving ten (10) days notice in the manner provided for notifying sales on execution upon the judgment of justice of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining state created for similar purposes up-

on the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purpose for which the corporation in this state is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two-third (2-3) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the promptdelivery of logs destined for points below the works constructed under authority of this act."

Section 14 of Chapter 32, of the General Statutes of Minnesota for the year A. D. 1878, being now section 2400 of the statutes of Minnesota of 1894; this statute will be hereinafter referred to as section 2400, and is as follows:

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books

of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor generals, or copies of such records duly certified, shall, in all courts of this state, be *prima facie* evidence of the matters stated in such scale bill, record or copy."

Section 16 of Chapter 32 of the General Statutes of 1878, being section 2402 of the statutes of 1894; this section will be hereinafter referred to as section 2402, and is as follows:

"The fees of surveyor general shall be: For surveying, scale marking, making scale bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for travelling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index to the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for traveling, surveying, making scale bills, or recording the same, or for any or all of such services, such surveyor general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon, and may retain such lien by affix-

ing to the scale bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such survey general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection first giving ten days' notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the country, and the only costs of collection allowed shall be ten per cent onthe amount due. for taking care of the property and, to the officer making the sale, ten per cent on the amount payable to the surveyor general."

This question is raised by the assignments of error numbered 1, 2, 3, 4 and 41, which are hereinafter specifically referred to.

Second, If it should be determined that the booms through which these logs ran were "booms chartered by a law of the state of Minnesota" so as to entitle the defendant in error Mullen, to scale the same under the provisions of section 2400 above quoted, then the plaintiff in error claims that section 2402 does not give a lien for the scaling under the provisions of section 2400; and plaintiff further claims that if section 2402 does give such a lien, then the defendants did not

show themselves, or either of them, entitled to any lien upon the plaintiff's logs, because they did not show a compliance with the statute.

This question is raised by the assignments of error numbered 5, 6, 7, 8, 9, 13, 31, 32, 34, 35, 36, 40 and 42, and which are hereinafter specifically referred to.

Third: Plaintiff in error claims that the statutes under which the defendant's claim a right to scale these logs and recover fees therefore, and to a lien on plaintiff's logs therefore, are as applied to the place and business where this scaling was done, an attempted regulation by the state, of interstate commerce, and are unconstitutional and void being in contravention of subdivision 4 of section 8 of article 1 of the constitution of the United States.

This question is raised by the assignments of error numbered 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 33, 37, 38 and 43, and which are hereinafter specifically referred to.

The plaintiff proved the quantity of logs in the various brails, by the scalers who scaled the same. These scalers were all employed by the Chippewa Logging Co. They testified that they scaled all these logs with a Scribner rule, and in the manner required by the statutes of the state of Minnesota, each log being scaled and put down on the scale bills according to its mark, and the various scale bills verified by the scalers were introduced in evidence, and showed the various marks and the number of logs and number of the feet of each mark, the aggregate of each brail being as set forth in the complaint.

Plaintiff also proved its ownership of the logs, and the fact and date of their seizure and detention by defendant Mullen, and their value and rested, (See printed record pages 22 to 33).

Defendant moved for judgment on the ground that there was no sufficient proof of ownership of the property but the court denied the motion (Printed record page 33).

Later in the case, the defendants introduced in evidence exhibit 9 (see printed record page 140). We suppose this was introduced for the purpose of throwing some doubt upon the

question of plaintiff's ownership of the four marks of logs which are shown in this exhibit 9, and which are a part of the marks upon the logs claimed by the plaintiff; and therefore, in rebuttal, the plaintiff offered to show by a witness who was familiar with the marks of the logs that were cut upon the Chippewa river and ran through the West Newton booms, that these marks shown in exhibit 9, were in fact put upon logs cut upon the Chippewa river and belonging to the plaintiff; and the testimony was rejected by the court upon this objection by counsel for the defendants.

"We object to it because it is not competent testimony to prove title, and so far as ownership is concerned, the court has held that ownership has been proved."

The objection being sustained, an exception was taken, and error is assigned upon such ruling. We make this statement at this time so that this court may be advised of the fact, that the question of the plaintiff's ownership of the logs is eliminated from the case.

Specifications of error relied upon by the plaintiff in error:

First: As to the first proposition of law above set forth:

Before introducing any evidence, defendants admitted in open court, that no request was ever made by plaintiff or any one else, that the surveyor general (defendant Mullen) should scale *any* of the logs running through the boom at West Newton in the year 1893 (Printed record page 33.)

Defendants then offered in evidence the articles of incorporation of the Minnesota Boom Company (Exhibit 1, pages 107 to 109) and defendant Mullen's commission as surveyor general (Exhibit 2, page 109,) and each of these papers was received in evidence, against plaintiff's objection that they were immaterial, and exceptions to such rulings were taken by plaintiff, and constitute the ground for its first and second assignments of error (printed record pages 33, 149-150-1 and 2.)

It then appearing that the Minnesota Boom Company was a corporation organized under the general laws of the state

of Minnesota, with only such powers as those laws confer, and no claim being made that it had any further "charter," and it having been admitted that the scaling for which defendants sought to recover was not done at the request of anybody, plaintiff interposed an objection to any further proof under the answer, upon the ground that said answer does not state any facts which constitute any defense to this action, and on the ground that the same is immaterial, irrelevant and incompetent; which objection was overruled and plaintiff excepted, and this ruling constitutes the ground for the third assignment of error (see printed record pages 33 and 151.)

Defendants then offered a certified copy of the official oath and bond of defendant Mullen, and the same was received against plaintiff's objection that it was immaterial, to which ruling exception was taken by plaintiff, and this constitutes the ground for the fourth assignment of error (printed record pages 33, 34 and 151.)

The evidence shows that the booms referred to in the pleadings and evidence, consist of a series of structures substantially as follows:

West Newton slough is an arm or minor channel of the Mississippi river, bounded on its southwestern side by the main land constituting the state of Minnesota, and on the other side by an island extending up and down the river about three miles, and dividing this "slough" from the main channel (printed record page 34.) Before this slough was occupied by booms, it was navigable for steamboats (printed record page 56.) Extending from the upper end of this island, diagonally across the river to the Wisconsin shore, is a structure called a shear boom, so arranged that when it is closed it turns all the logs coming down the river into the upper end of the slough; this shear boom is so arranged that one end of it upon being released floats down the stream and allows boats and other water craft to pass, and after they have passed it is arranged to close. (This shear boom and its surroundings' are shown in Exhibit A, page 244 of original record, and it is described more specifically by the witness Douglas on pages 62 and 63 of the printed transcript.)

The logs are thus turned into the upper end of the slough in a common mass which fills the entire slough. At the lower end of the slough, and extending up into it nearly a mile, are the structures which have been erected for the purpose of assorting and brailing the logs. The large map attached to the bill of exceptions, shows a bird's eye view of these structures; they are described in detail and the method of operation given by the defendants' witness Mullen on pages 34-5-6, and Foreman pages 44-5-6, and plaintiff's witness Douglass on pages 56-7. It is sufficient for us to say, that ample and proper arrangements are made for the purpose of assorting out from the common mass, the logs of each owner, and putting them in a receptacle called a pocket, where they are straightened out and fastened together in what is called a brail, which constitutes a section of a raft for towing by steamboats. It is in these pockets, and while the logs are being arranged and brailed, that the scalers do their work of measuring the logs, ascertaining the different marks in each brail and putting down and keeping a record of the marks, the number of logs and number of feet of each mark; as soon as each brail is finished, it is taken down river below the booms a short distance and put with a sufficient number of other brails belonging to the same general owner to constitute a raft; and as soon as this is done, the logs are turned over to their respective owners and taken away in rafts by tow boats.

At the close of the evidence, the plaintiff requested the court to declare as a proposition of law, that it has not been shown that the logs for which the defendants claim fees for scaling in this cause, ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed, or to any lien on the plaintiff's logs therefor.

This request was refused and the plaintiff excepted, and this ruling constitutes the ground for the 41st assignment of error (see printed record pages 103 and 165.

Second. As to the second proposition of law in controversy here:

It appeared from the defendant's evidence, that the defendant Mullen himself was a practicing lawyer, he never had

any practical experience whatever in scaling logs or lumber up to the time of his appointment as surveyor general, and did not scale personally any of the logs (printed record page 41); and that his chief deputy William Foreman was a farmer, had never lumbered any, never had any experience in handling logs in any way, and did not scale a log, or undertake to direct the men how to scale logs, (printed record page 50.)

Defendant Mullen testified that he took possession of the logs in question under a claim of a lien for scaling or surveying the same, and that that was all the claim he had (printed record page 38.)

The defendants then produced Defendant's Exhibit 3, sample pages of which are to be found at pages 113 to 128 of the printed record, which purports to be a scale bill of pine logs scaled to the mark for the *Minnesota Boom Company* during the month of June 1893 at West Newton boom by John H. Mullen and deputies. This scale bill contained a great number of different marks of logs each day, with the number of logs and number of feet carried out opposite each mark; the number of different marks on many days exceeded 150, while the number of marks of the logs claimed by the plaintiff did not exceed 10 or 15; this scale bill showed an aggregate of 1,265,741 logs, 183,062,299 feet (printed record page 128), which purport to have been scaled by the surveyor general and his deputies during the month of June 1893, being at the rate of about 7,000,000feet every working day of that month.

Defendants also produced exhibit 4, which is a similar document, except that it relates to the scaling of logs in the month of May and shows a total of 254,996 logs, 38,716,510 feet (see printed record page 131).

Defendants also produced their exhibits 5 and 6, which are found in the printed record at pages 133 to 139 inclusive, and which are each addressed "To the Minnesota Boom Company, the managing agent thereof and whomsoever it may concern;" and which notified the parties to whom the notice is addressed, that the defendant Mullen as surveyor general had seized and taken possession of the logs in question, and that said seizure had been made and possession taken by said sur-

veyor general to enforce payment of certain fees of said surveyor general for surveying the logs run out of the boom of the said Minnesota Boom Company during the month of June, 1893, which fees amounted—for the June scaling—to $9,153.10, and—for the May scaling—to $1,935.82. (See record pages 133 and 139).

The defendants proved by their witnesses Mullen and Foreman, that these papers were delivered to one George Scott, who, defendants claim, was the general manager at the boom that season. Mr. Foreman says (printed record page 49) that he served exhibit 3 and exhibits 5 and 6 on Mr. Scott on the 7th day of July, and he also says, that the logs in question were seized by the defendant Mullen some days before the 7th of July.

The plaintiff's witness Chapman, who was in charge of the logs for the plaintiff, says that all of the logs were taken possession of on the 30th day of June (printed record pages 29-30.)

The papers, exhibits 3 and 4, being what purport to be the scale bills, and 5 and 6, being the notices of the taking of the logs and claim for a lien, were each and all received against the plaintiff's objection that they were incompetent, irrelevant and immaterial, all of which objections were overruled, and the plaintiff duly expected. These exceptions constitute the ground for the 5th, 6th, 7th and 8th assignments of error (see printed record pages 40, 49, 151 and 152-3).

The plaintiff, both upon cross examination of the defendant's witness Mullen, (printed record page 43) and upon his direct examination as witness for the plaintiff (page 95) offered to show that neither on the 15th day of May 1893, nor any time thereafter during the period covered by exhibits 3 and 4, was there any mark of logs, or log marks recorded in the office of the surveyor general of the fourth district, in accordance with the provisions of the statutes of Minnesota in relation to the recording of log marks.

On cross examination the objection was made by the defendants that this testimony was not competent, material or

proper cross-examination. The court, however, sustained the objection on the ground alone that it was immaterial (printed record page 43); but on the direct examination of the witness as a witness for the plaintiff, the objection interposed and sustained was, that the testimony was immaterial. To these rulings the plaintiff excepted, and this constitutes the grounds for the 9th and 31st assignments of error (printed record pages 153 and 161).

No other proof of the scaling of these logs by the defendant Mullen, and no proof whatever that the scale bills introduced and received in evidence, were ever recorded in the office of the surveyor general of the fourth district, was introduced or offered by the defendants.

The right and title of the state of Minnesota rests upon defendants' exhibit 8, which is in the words and figures following.

"For value received I hereby sell, assign, transfer, set over and deliver to the state of Minnesota, any and all right and claim of whatsoever name, nature and description for services performed and disbursements made and expenses incurred by me as surveyor general of logs and lumber of the fourth district of the state of Minnesota, and I hereby authorize and fully empower said state to collect the same in any manner which may be deemed best.

"In witness whereof I have hereunto set my hand and seal this 12th day of February, A. D. 1895.

"JOHN H. MULLEN. (Seal.)

"Signed, sealed and delivered in presence of

"C. G. LAWRENCE.

"RICHMOND D. WARNER."

(Printed record page 54.)

The only authority for this assignment, or for the state of Minnesota assuming any interest in or charge of this cause, is found in Chapter 401 of the laws of the state of Minnesota for the year 1895, which is as follows:

"An act for the relief of John H. Mullen, and to appropriate money therefor.

"Be it enacted by the legislature of the state of Minnesota:

"Section 1. That the sum of fifteen thousand eight hundred (15,800) dollars be and the same is hereby appropriated out of any money in the state treasury, not otherwise appropriated, for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the Fourth district of the state of Minnesota, in accordance with the instruction of the governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same to said Mullen, and the state treasurer is hereby directed to pay the same.

"Section 2. Before said payment is made said Mullen shall assign to the state of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the state of Minnesota shall proceed to collect the same in the name of said Mullen or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the state of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act.

"Any sums collected by the state up to the amount hereby appropriated shall be paid to the state treasurer and placed to the credit of miscellaneous appropriations.

"Section 3. This act shall take effect and be in force from and after its passage.

"Approved April 26th 1895."

At the close of the defendants' case, the plaintiff moved the court for judgment against the defendants, upon the ground that from all of the evidence in the case, as it now stands, the defendants have failed to show any interest in or lien upon, or right to possess the property described in the complaint.

Among other things, the court's attention was specifically called to the fact, that so far as the June scale bill was concerned, it appeared conclusively from the evidence that it was not made out or delivered to anyone until three or four days after the logs had been seized, while under the statute of the state of Minnesota under which the defendant Mullen claimed a lien, he would have no right to take possession of any property until after he had made out and delivered these scale bills and notice of claim of lien (printed record page 55.)

The court denied this motion and the plaintiff excepted, and this constitutes the ground for the 13th assignment of error (printed record pages 55 and 154.)

The plaintiff in rebuttal called the defendant Mullen, who testified that all the records that he had of the scale bills (defendant's exhibits 3 and 4) were present in court; he produced a book which purported to be a record of a part of exhibit 4; the same was offered by the plaintiff for the purpose of showing that the scale bill, exhibit 4, which had been offered in evidence, had never been recorded in the office of the witness. The copy of the first and last pages of this book are found at pages 141 to 143 of the printed record.

The witness produced a letter press impression book, which he testified was the only record he had of exhibit 3. This book was also offered in evidence for the purpose of showing that no record was ever made of defendant's exhibit 3; no copy of this book is attached to the bill of exceptions, it appearing impossible to make a copy, but the original book has been sent up, and the court's attention will be called to certain pages of it in connection with copies of the same pages of the original scale bill.

The plaintiff proved by E. E. Sinclair, a deputy of the surveyor general of the second lumber district of Minnesota

(being the district in which the marks of all logs cut on the Mississippi river above Minneapolis, are recorded), that certain log marks shown upon exhibit E were not recorded in his office, with one exception which he indicated, and which is the third mark shown upon exhibit E (see printed record pages 97 and 144).

It also proved by F. B. Yates, a deputy of the surveyor general of the first lumber district of the state of Minnesota (being the district where the marks of all logs cut on the St. Croix river and its tributaries are recorded), that none of the same marks as those shown upon exhibit E were recorded in that office, except two, which are indicated on plaintiff's exhibit G, page 146. Mr. Yates' testimony will be found on page 101.

Plaintiff then called Hugh Stewart, who testified that he was employed all the time that the assorting and booming of logs was carried on at West Newton, in the office in charge of the log books, and that before that time he was employed on the other side of the river in the same capacity; and that his duties required him to become and that he had become and was familiar with all the marks that came through these booms in these different years. He was then shown plaintiff's exhibit F (printed record page 145) and testified that he made out the paper, that he got the dates and the marks, the number of logs and the number of feet set forth in the paper, out of the May and June scale bills of the surveyor general—that is, defendant's exhibits 3 and 4—; and that in the performance of his duties, he saw, every year, all of the marks of logs that were turned into the office of the various scalers (see printed record page 98). He was then asked this question:

"Did you ever see any of the marks that are on this exhibit F?"

The defendants objected to the question as immaterial and incompetent.

The Court: What is the object of the testimony?

Plaintiff's Counsel: The purpose of the testimony is to show by this witness and others, that these scale bills, so far as they relate to these logs, which amount to a million feet,

are not only incorrect, but they represent logs that did not go in there at all. There is no such mark of logs going through there.

The court then sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by the witness, that during all the time which he has been employed in the office of the West Newton booms, he never saw any of the log marks set forth in plaintiff's exhibit F; this testimony to be followed by the evidence of the scalers for the Chippewa Logging Company that the logs were not in fact in the brails of logs in which they may appear to be by the tally sheets in the surveyor general's office, and by the evidence of the men who had charge of the catch marking of the logs, showthat these marks were marks that were not known at those booms, and that it was the duty of more than thirty men, if any such marks came to them, to tie it up with a line and hold it until his attention was called to it to give directions where it should go.

The defendants objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which order and ruling plaintiff duly excepted and these rulings constitutes the ground for the 32nd assignment of error (see printed record pages 98-9 and 161-2.)

Plaintiff then called Henry Phitts, who testified as follows:

I live in St. Paul; I am working for the St. Paul Boom Company. I was working at the West Newton boom in the summer of 1893, looking after the sorting, looking after the sorters. I used to look after the logs and see that they marked them right and that they went into the right places. I had to tell the men engaged in the catch marking what to put on them and what bark marks to put on. I gave the same instructions to the men that were stationed at the various gaps to look all the logs over and see that they were properly sorted. There must be upwards of thirty different men stationed at these gaps to perform the same duties. If

a log came to one of these sorters with a mark on it that we have not given here, and one that he is not familiar with he tied it up until I came along. I was there during the entire season performing the same duties all the time, and I had performed these duties before that. I could not tell you how many years I started before 1889. I have been performing those duties ever since the starting of the boom at West Newtown, with the exception of the first year.

Q. I show you plaintiff's exhibit F, and ask you to look at the marks upon that exhibit and see whether you ever saw any of them before?

Defendants objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that he never saw any of the marks on this exhibit F, and that it would be impossible for the number of logs which is said to have been marked with these marks (which number exceeds a hundred) to have passed through this boom on any one day (as it appears from these scale bills offered in evidence, that they did) without the attention of this witness being called to it, and that they did not in fact pass through there.

Defendants objected to the testimony as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted and these rulings constitute the ground for the 34th assignment of error. (See printed record pages 99-100 and 162).

The plaintiff then called James C. Daly, who testified that he had charge, for the defendant Mullen, and was overseer of the scaling of logs; that he had general charge and oversight over the deputies who did the scaling. He was then asked this question:

"Were the men who were employed under your supervision there, men who had worked at scaling logs at West Newton or Beef Slough?"

The defendants objected to the question as immaterial.

The Court: How is that material?

Plaintiff's counsel: I think it will become material by showing that they were not, with some few exceptions, and we expect to show that it is impossible for a man who was not familiar with that work and with the marks there, to make a correct scale of logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that there were over thirty scalers employed by the defendant to do the scaling at West Newton during the summer of 1893, and half as many tallymen, and that all the tallymen, with the exception of six, and all of the scalers, were men who were inexperienced and had never had any experience in scaling logs at the West Newton booms, and that by reason of the great number of marks that are rafted together for the Chippewa Logging Company and the Mississippi River Logging Company, it is impossible for an inexperienced scaler with an inexperienced tallyman, to make any correct scale and return of the logs and marks thereon, and that, as a matter of fact, the scales or pretended scales made there by the surveyor general's deputies, were grossly inaccurate.

The defendants objected to the testimony so offered as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The witness then further testified:

I have scaled their logs for a number of years. I also scaled the same class of logs on the other side of the river at Beef Slough. I scaled a number of years on the other side, and one year at Beef Slough, so I am familiar with the method of doing the work and the class of work to be done.

The plaintiff then renewed the offer above set forth, and the defendants again objected to the testimony so offered, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitutes the ground for the 35th assignment of error (see printed record pages 100 101 and 162-3).

Plaintiff also called Colin McMillan, who had charge of a crew of deputies or scalers for the defendant Mullen during the summer of 1893. He testified that he scaled some of the logs and had general supervision of the other men. He was then asked this question:

"State whether any of the men under you in scaling these logs scaled all logs twenty-four feet and over in length, as two logs?"

The defendants objected to the question as immaterial and incompetent, and the court sustained the objection; to which ruling and order plaintiff duly accepted, and these rulings constitute the ground for the 36th assignment of error (see printed record pages 101-2 and 163).

After the plaintiff rested its case in rebuttal, the defendant offered in evidence two pages of the book which had been marked plaintiff's exhibit D (the letter press impression book) and which papers were marked A and B.

The plaintiff objected to these two papers as immaterial and incompetent, because there is nothing in these two sheets which is any evidence which the law authorizes or requires the surveyor general to record, and the original papers have already been offered in evidence and are attached to defendant's exhibit 3. Also for the reason that they form no part of the scale bills. Also for the reason that there is no provision for recording such a paper, and the paper now offered in evidence is not in any sense a record; but the court overruled the objection and received the papers in evidence, and copies of the same are attached to the bill of exceptions and marked exhibits A1 and B1, and are found on the printed record page 148.

To this ruling the plaintiff excepted, and this constitutes the ground for the 40th assignment of error.

At the close of the case the plaintiff asked the court to declare, as a matter of law,

"That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

"a. Because the scale bills, the defendants' exhibits 3 and 4, are not evidence of the scaling of the logs therein described;

"b. Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district;

"c. Because it appears that a very great proportion of the logs mentioned in these scale bills, defendants' exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else;

"d. Because the pretended records of said scale bills were not in fact any record whatever;

"e. Because it does not appear that any of the log marks shown on defendants' scale bills, exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the 4th district of the state of Minnesota in accordance with the provisions of title 3 of chapter 32, General Statutes of the state of Minnesota."

The court refused to do so, to which ruling the plaintiff duly excepted, and this ruling constitutes the ground for the 42nd assignment of error. (Printed record pages 104 and 165.)

THIRD.

As to the third proposition of law above set forth:

The plaintiff proved by the witness Douglass that all of the booms and structures which had been erected in the West Newton Slough were erected by the Mississippi River Logging Company; this work was commenced in 1884, but the sorting works were not put in until 1889. This witness employed all the men, procured all the materials, and paid for both the labor and the materials, and he did this for the Mississippi River Logging Company. He testifies positively that he did not do the work, or any part of it, for the Minnesota Boom Company, and was never employed, in any capacity, by the Minnesota Boom Company.

The witness further testified that the logs that came into the booms of the Mississippi River Logging Company at West Newton in the summer of 1893, came from the Chippewa River, and that about two-thirds of these logs belonged to the Mississippi River Logging Company and the Chippewa Logging Company. That there were several hundred different marks of such logs belonging to the Mississippi River Logging Company and the Chippewa Logging Company, and all of those marks, and all of the logs of those several hundred marks, were put into one pocket or set of pockets as they came through.

He further testified:

Q. How much difference in respect to time and how much difference in the extent of the work and the time to do the work would it have made if all of these marks had had to be sorted separately as other marks were?

"A. I shouldn't think you could do it at all. We would not have room enough; we would not have room to do it.

"Q. Would the delay that would have been occasioned have been such as to prevent getting anywhere near the full amount of logs through in any one season?"

The defendants objected to the question as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 14th assignment of error (printed record pages 57-154.)

It appeared from the testimony of this witness, that he had general charge and supervision of the assorting of all the logs that came into these booms, and the delivery thereof to the steamboats. He was then asked this question:

"Q. Now I will ask you this question: State, if you know, who, during all the time for the several days set opposite the two marks on defendants' exhibit 9, was treated and recognized by you and the men under you, as the owner of these two marks, and to whom the logs bearing these two marks were delivered?"

The defendants objected to the question as immaterial and as calling for a conclusion of the witness.

The Court: What would the testimony tend to show?

Plaintiff's Counsel: The testimony tends to show that during all of these years, these logs running though this boom, were treated as belonging to the Lindsay & Phelps Company, and to follow it up by showing that no one else has ever made any claim to them, and then we shall offer to show that none of those logs with that mark ever got into that boom.

Mr. Richardson: We object to it because it is not competent testimony to prove title, and as far as ownership is concerned, the court has held that ownership has been proved.

The court then sustained the objection; to which order and ruling plaintiff duly excepted, and this ruling constitutes the ground for the 15th assignment of error (printed record pages 57, 58, 155).

He then testified that during the winter months he worked in the woods for the Mississippi River Logging Company, looking after the quality of the logs that were for that company, and the Chippewa Logging Company, and visited the logging camps that were being conducted by other parties, and saw the marks that were put on their logs, that prior to 1893 he saw, in the course of his travels on the Chippewa waters, logs being put in there bearing some of the marks that are on defendants' exhibit 9; the logs bearing the first two marks on that paper, were being put in for the Lindsay & Phelps Company, and the last mark was cut for the Chippewa Logging Company several years before 1893; and that after he saw those logs up there in the woods, he saw the mark coming through the boom.

"Q. Has any one else other than the Lindsay & Phelps Company ever made any claim there at the boom to any logs bearing either of the two first marks on this exhibit 9?"

The defendants objected to this question as immaterial and incompetent and no foundation laid. The court sustained the objection, to which order and ruling plaintiff duly excepted, and this ruling constitutes the ground for the 16th assignment of error (see printed record pages 58, 155.)

It also appeared from the testimony of this witness, that during the summer of 1893 there were close to 500,000,000 feet of logs rafted out of the boom at West Newton; that there were other places provided for storing these logs besides that part of the West Newton slough that was above the sorting and rafting works, these places being at Minnieska, below the boom, and in Beef Slough and on the Mississippi river on the Wisconsin shore, above the boom; that it would not be practicable to run a boat through the West Newton Slough at the present time; that the government dams shown in exhibit "A" (original record page 244), were built before the booms in question were (printed record pages 58-9.)

Prior to 1889 the work of sorting and rafting the logs that came down the Chippewa river had been done at Beef Slough, Wisconsin. Beef Slough is one of the outlets of the Chippewa river into the Mississippi river, or was at that time. The lower end of that outlet is just below the shear boom that turns the logs into the West Newton boom; the main outlet of the Chippewa river into Beef Slough is about fifteen miles above the main mouth of the Chippewa.

This witness further testified:

We left Beef Slough and went to the Minnesota side of the river to do this sorting and rafting of those logs because Beef Slough got filled up so we could not take logs through. It was necessary to have some other place. We took over to West Newton all of the booms and fixtures that we had used at Beef Slough and entirely abandoned Beef Slough for that purpose (see printed record page 62.)

The witnesses Mullen and Foreman, for the the defendants, had been permited to testify,—against the objection of the plaintiff, that it was immaterial and after counsel for the plaintiff had disclaimed any claim that the defendant Mullen was not entitled to his fees for scaling whatever logs he did scale, by reason of the fact that before he commenced to scale some logs had run through the boom, and had admitted that the parties in charge of the booms objected to his scaling the entire mass of logs in the boom at all times, not only while they succeeded in

preventing it, but afterwards—that repeatedly brails of logs were let out of the different pockets and sent down the stream before the surveyor general's men had finished scaling them, carrying their men down the stream four or five miles, so that they would have to row back against the current and lose perhaps half a day (printed record pages 37-8, 48-9).

The attention of the witness Douglass was called to this statement; he was asked this question:

"Were there any brails of logs taken out of any other pockets and dropped down the river until it was necessary to do so in order to carry on the business there?"

The defendants objected to the question as calling for a conclusion of the witness. The court sustained the objection; to which ruling and order plaintiff duly accepted, and this ruling constitutes the ground for the 17th assignment of error. (Printed record pages 59 and 155).

The plaintiff called Levi P. Smith, and it appeared from his testimony that for 14 years he he had been employed continuously by the Chippewa Logging Company, superintending the scaling of their logs. His duties were performed on the Chippewa river and its tributaries, and at Beef Slough and West Newton; in the winter season he was employed in inspecting and grading the logs, and his work extended over one-half or three quarters of the territory covered by the Chippewa and its tributaries.

(Mr. Douglass had testified that during the years from 1888 to 1893 inclusive, he was engaged in practically the same business as Mr. Smith, his work being confined to the eastern tributaries of the Chippewa; during that time he saw nearly all of the logs that were cut on the eastern tributaries; printed record page 58).

Mr. Smith worked in the territory generally that was not covered by Mr. Douglass; he saw practically all of the other logs that were being put in by other parties in the same streams, and noticed the log marks, and was familiar with most of the marks that were being put upon the Chippewa Logging Com-

pany's logs. During the time the sorting and rafting of the logs was going on, his duties were looking after the scaling at that point, and he himself employed all of the scalers. Previous to 1889, the work of assorting and rafting the logs that came down the Chippewa river, was carried on at Beef Slough on the Wisconsin side, and he was employed in the same capacity at that point.

He also testifies to the manner of scaling the logs, substantially as had been testified to previously by the men who actually scaled them as above set forth, and that the logs that came through the West Newton boom in 1893 came from the Chippewa river and its tributaries in the state of Wisconsin.

He further testified that all of the logs that were cut and and put on the banks of the Chippewa river and its tributaries for the Chippewa Logging Company did not come down to West Newton, that some of them are stopped at Chippewa Falls and Eau Claire, and he gave the names of the parties who were members of the Chippewa Logging Company and who stopped and took out logs at Eau Claire and Chippewa Falls.

Q. You may state how, if you know, these logs are scaled that are taken in by these companies that you named at Chippewa Falls and Eau Claire.

The defendant objected to the question as immaterial.

Plaintiff's Counsel: The object of the testimony is to show that all of the logs of the Chippewa Logging Company everywhere after they leave the banks are scaled for the purpose of enabling the company to make a fair and equitable division among themselves of their property. The property, as will appear by the witness' testimony later on, is acquired by the Chippewa Logging Company from the various members of the corporation in proportion to the amount of money that is contributed to acquire the property; then, as the logs come down the river the proportion of the Chippewa people is taken out, the balance of the logs go on down the river. This is done —and in order to make a fair and equitable division of their logs, the logs are scaled full.

The court then sustained the objection, to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by this witness that all of the logs of the Chippewa Logging Company and of the Mississippi River Logging Company which came down the Chippewa river, whether they are taken at Chippewa Falls or Eau Claire by the members of the Chippewa Logging Company, or whether they are assorted and divided among the members at West Newton, are scaled full, that is, without making any deduction whatever for rot, crook, or other defects that may appear to be in the logs.

The defendants objected to such testimony as immaterial.

The court sustained the objection, to which ruling and order plaintiff duly excepted.

Plaintiff's Counsel: I propose to follow this up by the testimony of other witnesses and by the testimony of this witness, showing that the scaling is done in this manner for the purpose of making an equitable division among the members of the Chippewa Logging Company and the Mississippi River Logging Company.

The defendants objected to the offer as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 18th assignment of error (printed record pages 65-6, 155-6.)

This witness also testified, that so far as he knew, every log that went into the West Newton booms in 1893 was cut on Chippewa river. It further appeared from his testimony, that during the year 1893, as well as for a long time before that, the logs had been brought down the Mississippi river from above the mouth of the Chippewa in rafts; that there was a railroad bridge across the Mississippi river at Read's Landing, just below the mouth of the Chippewa, and that it was possible that if a raft of logs coming down from above should be broken up at the railroad bridge, and not picked up there by the steamboat engaged in towing it, it might be driven down into the West Newton Booms.

The plaintiff also called Artemus Lamb, the vice president of the Mississippi River Logging Company, who had held that

office for 20 years, and who was also secretary and treasurer of C. Lamb & Sons.

It appeared from his evidence that C. Lamb & Sons are stockholders in the Chippewa Logging Company, and that the principal business of C. Lamb & Sons is manufacturing logs into lumber, and running steamboats and bringing logs from the Chippewa river and its tributaries to their mills at Clinton, Iowa. That C. Lamb & Sons, as a distinct corporation, carried on a distinct logging business on the Chippewa river during the year 1893, and prior to that time. and sold their logs to the Chippewa Logging Company, which is commonly known as "The Pool".

"Q. I wish you would state the method of doing business by the Chippewa Logging Company from the time that the logs were cut in the woods until they were sorted out of the booms, or wherever they were sorted, and how the division is made between the various members of that company of the logs which belong to that company."

The defendants objected to the question as immaterial and incompetent, as being a question which the the court has already ruled out, and also because this matter is carried out by the books of the company to which the defendants have no access.

The court sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to show by this witness, in his deposition, that the logs are cut from timber owned by the Chippewa Logging Company by their own men and teams, or by jobbers, and delivered in the waters of the Chippewa, and that they were driven by what is termed a driving company, down to Eau Clare on the Chippewa; that when they got to Chippewa Falls and Eau Claire certain members of the Chippewa Logging Company are entitled to a certain percentage of the logs cut and bought the previous year. It is the custom to take into the booms a certain number of hours or days, and then they are passed down the river for a certain number of hours or days, which is determined by the per cent that be-

longs down the river and by the per cent that belongs at Eau Claire. Then there are scalers appointed by the Chippewa Logging Company for each mill which belongs to the pool. This has reference to the Chippewa Falls and Eau Claire members. They are at the foot of the slip and scale all logs as they come. These logs, then, that belong to the Mississippi River Logging Company are brought on to West Newton, Minnesota, and there they are boomed and rafted by the Mississippi River Logging Company, and are scaled by scalers appointed by the company by the same methods that are used at Eau Claire. The method of scaling at Eau Claire is what is termed the full scale—that is, without making any deductions for defects—and the same thing is done at West Newton—that is, for adjustment between the members of the company, that is, between the Eau Claire people and the Mississippi River Logging Company; that the proportion or percentage of the logs that each member of the Mississippi River Logging Company is entitled to take is arrived at by the amount of the subscription to the original capital stock of the company. It was not subscribed in dollars and cents, but in so many million feet per year; practically in the proportion to their holding in the company; that the method of scaling what is known as the pool logs according to the full scale, is the result of an agreement between all the members of the Chippewa Logging Company and all of the stockholders.

The defendants objected to the testimony so offered as immaterial, and the court sustained the objection; to which ruling and order the plaintiff duly excepted, and these ruling constitute the ground for the 19th assignment of error (see printed record, pages 67-8, 156-7.)

This witness further testified, that in the division of the pool logs among the members of the company—such of them as came down to West Newton and were rafted there—it was not known which particular member of the pool would get any given brail of logs, until the boat arrived there and received them.

The witness was then asked this question:

State what the general rule is as to whether there is a

raft of logs then ready for him to take away from the booms, or whether the boats usually have to wait for the logs to be sorted and rafted after their arrival there, if you know.

This question was objected to as incompetent, immaterial and no foundation laid.

Plaintiff's counsel then called the court's attention to the allegation in the answer charging, in substance, that where the scaling was done by the log owners, or by the parties operating the boom which was controlled by the log owners, the quantity of logs was wilfully increased or diminished in the interest of the owners of the logs, and counsel stated to the court that the object of this testimony was to show that, as a matter of fact, it is impossible to show any such discrimination as is alleged in the answer.

The court remarked that there was no testimony on the part of the defendants to sustain that allegation in the answer, and that the question therefore seemed to be immaterial, and sustained the objection.

No error is assigned upon this ruling, but we think this court's attention should be called to it so as to avoid any impression in the minds of this court, that this allegation in the answer is, or can be in any way true.

The witness was then asked this further question:

"Would it be possible to make a fair adjustment between the Eau Claire and the Chippewa Falls members of the pool company, whose logs are taken out at Eau Claire and Chippewa Falls, and the down river members of the company if the logs that come through the West Newton booms were scaled what is termed straight and sound—that is, by the individual scalers using their judgment in making such deduction as would be necessary to make the logs sound, merchantable logs?"

The defendants objected to the question as incompetent, immaterial, and calling for a conclusion of the witness.

The court sustained the objection, to which ruling and order the plaintiff duly excepted, and this ruling constitutes

the ground for the 20th assignment of error (see printed record pages 71 and 157.)

The witness was then asked this further question:

"How long has the business of these companies been conducted in the same way that it was conducted in 1893, prior to that time?"

The defendants objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by this deposition, that the Mississippi River Logging Company had conducted the business in the same manner for twenty-two years, and that the pool had been in existence about thirteen years up to that time.

The defendants objected to the offer and testimony as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 21st assignment of error. (See printed record pages 71 and 157.)

The witness then testified, that the logs had not always been assorted at West Newton prior to 1893; that originally they were handled over at Beef Slough on the Wisconsin side of the river; and he was asked this question:

"And were they handled in the same way there?"

The defendants objected to the question and the court sustained the objection; to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 22nd assignment of error. (See printed record pages 71 and 158.)

It further appeared from the testimony of this witness that the members of what is known as the pool, that is, of the Chippewa Logging Company and the Mississippi River Logging Company, who took logs at West Newton, and prior to the time the West Newton booms were opened, at Beef Slough, were: Youmans Bros. & Hodgins, Winona; Laird Norton Co., and the Winona Lumber Co., of Winona; W. T. Joyce of

Lyons, Iowa; C. Lamb and Sons of Clinton, Iowa; Dimmock, Gould & Co. of Moline; Rock Island Lumber Co. of Rock Island Weyerhaeuser & Denkman of Rock Island; Musser Lumber Co. of Muscatine; Hershey Lumber Co. of Muscatine, and W. J. Young & Co. of Clinton, Iowa,

It also appeared from his testimony that C. Lamb & Sons did not have any logs in the summer of 1893, that were run into the booms at West Newton to be assorted out there, except such as were cut on the Chippewa river or its tributaries in the state of Wisconsin.

The plaintiff then called G. W. Cable, and it appeared from his testimony that he was president of the Cable Lumber Company, a corporation owning and operating saw mills at Davenport, Ia., and carrying on a logging business for the purpose of supplying its mills mainly on the Chippewa river at and prior to 1893, and that that company had logs coming from the West Newton boom in the season of 1893. The witness was then asked this question:

"Did your company make some arrangement or agreement with the Mississippi River Logging Company to scale such logs as they might have coming through that boom that year?"

The defendants objected to the question, and the court sustained the objection; to which ruling and order plaintiff duly excepted.

The plaintiff then offered to show by the deposition of this witness, that before the business of assorting and rafting the logs at West Newton boom commenced in the summer of 1893, an arrangement was made between the Mississippi River Logging Company and the Cable Lumber Company by which the Mississippi River Logging Company agreed to scale all of the logs of the Cable Lumber Company for a fee which was agreed upon and the Cable Lumber Company agreed that the Mississippi River Logging Company might scale them.

The defendants objected to the testimony, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the

23rd assignment of error (see printed record page 72 and 158.)

The plaintiff then called Frank W. Mueller, who testified that he resided at Davenport, Iowa, was in the lumber business, a member of the firm of Christian Mueller & Sons, and had been connected with that firm since 1879, the business of the firm being saw milling and lumber yards. The witness was then asked this question.

"In 1893 and prior to that time, where did you get your logs to manufacture?"

The defendants objected to the question as immaterial because the deponent is not a party to any of these cases.

The counsel for the plaintiff stated that the object of this testimony, as well as the testimony of several other witnesses, is to show that they were lumber manufacturers in Iowa, and that they cut logs on the Chippewa river and ran them down through these booms for the purpose of supplying logs for their mills.

The Court: It is just as well to show there were two or three, as to show that there were a great many.

Plaintiff's Counsel: I think this is material upon the question of interstate commerce. If all the logs that went in there were subjects of interstate commerce, and had never become a part of the general property of the state of Minnesota, then it must be said that this is a regulation of interstate commerce, and it is for the purpose of raising that question that this testimony is offered.

The court sustained the objection; to which ruling and order the plaintiff duly excepted.

The plaintiff then offered to prove, by the deposition of this witness, that all of their logs during the year 1893 were cut on their own lands on the Chippewa river, or bought on the banks of the Chippewa river and run through this West Newton boom and taken to their mills at Davenport to be manufactured; and the plaintiff offered to follow that testimony by the testimony of a large number of other witnesses that their

logs came through in the same way, and by evidence showing that they were substantially all the logs that did go through the boom.

The defendants objected to the testimony so offered, and the court sustained the objection; to which order and ruling the plaintiff duly excepted, and these rulings constitute the ground for the 24th assignment of error. (See printed record pages 72, 73 and 158.)

The plaintiff then called D. J. Batchelder, who was a member of the firm of Gardner, Batchelder & Welles in 1893, and had charge of their logging business; at that time they were engaged in the manufacture of logs and lumber at Lyons, Iowa. He was asked where this firm got their logs, and the testimony was rejected upon the same ground as that of the Mueller, and an exception taken.

The plaintiff also offered to show by this witness, substantially the same agreement with reference to the scaling of the logs of the firm of Gardner, Batchelder & Welles, that was offered to be shown by the testimony of G. W. Cable above referred to, and this testimony was rejected on the objection of the defendant's and an exception duly taken; and these rulings constitute the ground for the 25th and 26th assignments of error. (See printed record pages 73-4, 158-9.)

The plaintiff then proved a written contract between itself and the Mississippi River Logging Company, for the scaling of their logs, which will be found at pages 74 and 75 of the printed record.

The plaintiff offered in evidence the depositions of William E. Sawyer, George H. Ray and Lucius Coleman for the purpose of showing that the logs of the various lumbering firms and corporations of which these witnesses were officers or members, that came through the West Newton booms in 1893 were cut upon the Chippewa river and destined—all of them—to be taken to the saw mills of the said several firms and corporations located at La Crosse, Wis., Quincy, Ill., and Hannibal, Mo., and that each of these owners made an agreement with the Mississippi River Logging Company to

scale all of their logs that might come through those booms in that year, substantially similar to that between the plaintiff and the Mississippi River Logging Company.

This evidence was objected to by the defendants as immaterial and the court sustained the objection, to which the plaintiff duly excepted, and this ruling constitutes the ground for the 27th assignment of error (see printed record pages 90 and 159.)

Plaintiff also called Mr. Frederick Weyerhaeuser, who testified that he had been engaged in logging and lumbering nearly all of the time since 1856; was president of the Mississippi River Logging Company and the Chippewa Logging Company, and had been such officer since the organization of both companies. He was then asked this question:

Q. "When the Mississippi River Logging Company was organized who were the members of it?"

Objected to as immaterial.

The plaintiff then offered to show by this witness, that the members of the Mississippi River Logging Company—some eight or ten of them in all—were all lumbermen or manufacturers of lumber, residing or having their places of business in the states of Iowa, Illinois and Minnesota, and that the purpose, and sole purpose, of the organization was to facilitate and render less complicated, the driving and handling of their logs after they were put into the Chippewa river, and perhaps the Black river, and that the general course of business of that company has always been substantially that all of the logs that were cut by or for the company were run down the Chippewa River, first to Beef Slough, and afterwards to West Newton Slough, when the work was moved over there; that the logs belonging to the company were all sorted and put in one place under one head, although there were a great many different marks, and that as fast as those logs were sorted out they were divided among the members and taken away by them to their several places of manufacture, according to the interest of each of the members in the company, which interest was determined by the amount contributed by each of the members

in any one year to the fund of the company, which was used in acquiring the logs which it did acquire, and that the logs of the Mississippi River Logging Company and of the Chippewa Logging Company below Eau Claire, constituted at least two-thirds of all the logs that came down that river in every year, including the year 1893.

The defendants objected to the evidence so offered as immaterial, and the court sustained the objection, to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 29th assignment of error (printed record pages 93 and 160).

The same witness was then asked this further question:

"During the year 1893 and years prior to that time, as far back as 1889, you may state whether or not all of the logs that came out of the Chippewa river into the West Newton booms, outside of the logs that were owned by the Chippewa Logging Company and the Mississippi River Logging Company, came there under any agreement or arrangement with the several owners; and if so, what the agreement was."

The defendant objected to the question as immaterial and because the agreement has been shown already.

Counsel for plaintiff stated that the agreement, as far as the cases of Lindsay & Phelps Company, John Paul Lumber Company, and Davidson Lumber Company, has been shown, and I am not asking to show that over again. The propositon is, to show that the Mississippi River Logging Company and the Chippewa Logging Company put their logs in there, and also to show that the other owners of logs, of logs that came in there, agreed with these people that they should take them and put them through their booms, sort them, scale them, and deliver them to them rafted.

Counsel for defendants: A number of depositions have been offered here for the purpose of proving this matter, and they have been excluded thus far as being immaterial.

Counsel for Plaintiff: That is true, and that is the reason I make the offer by this witness, because these depositions do not cover all of the logs.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Plaintiff then offered to show by this witness, that all of the logs that came down the Chippewa river and did not belong to the Mississippi River Logging Company or to the Chippewa Logging Company, were turned over to the Mississippi River Logging Company; that there was an agreement by which the company was to drive the logs down the Chippewa boom and assort and raft them and deliver them rafted, to their respective owners at the foot of the West Newton boom.

The defendants objected to the testimony so offered as incompetent and immaterial. The objection was sustained by the court; to which ruling and order plaintiff duly excepted, and these rulings constitute the ground for the 30th assignment of error (see printed record pages 93-4 and 161).

The witness Hugh Stewart testified.

"Q. It appears from the tally sheets offered in evidence in this case, that there was in brail No. 1637 one log marked *Z* M *Z*. You will state whether or not that log was a stray log, as had been defined by Mr. Douglas here.

"A. It was. That log and other stray logs like it, was accounted for to the real owners as follows: The log is posted to the mark; the owner gets the credit for it that way. It is entered up to his credit in the fall and a statement sent to him, and a settlement made if the balance is in his favor or against him.

"Q. Is there, or has there been, any attempt made on the part of the owners of these stray logs to follow the logs themselves and take them out of the brails where they happen to be?"

The defendants objected to the question as immaterial, and the court sustained the objection; to which ruling and order plaintiff duly excepted, and this ruling constitutes the ground for the 33rd assignment of error (see printed record pages 99 and 162).

Witness was then asked the following question:

"Have you made a computation, for the purpose of being able to testify, what proportion of the logs that came through the West Newton boom in the summer of 1893 and the years prior thereto, belonged to parties who resided outside of either the State of Minnesota or Wisconsin?"

The defendants objected as immaterial.

The Court: How is that material?

Plaintiff's counsel: It is material as tending to show the character of the business carried on there, that it was purely and entirely interstate commerce.

The court then sustained the objection; to which ruling and order plaintiff duly excepted.

Q. Have you made a computation so that you can testify as to the amount of logs that were rafted and scaled through the West Newton boom in the summer of 1893 that were not claimed by anybody and that you had no means of knowing to whom they did belong?

The defendants objected to the question as immaterial.

The Court: How is that material?

Plaintiff's counsel: It is material in this way: We expect to show by this witness that out of 500,000,000 feet of logs that came through that summer, all of the logs except 120,000 feet belonged to parties that were engaged in logging on the Chippewa river.

The court then sustained the objection; to which ruling and order plaintiff duly excepted, and these rulings constitutes the grounds for the 37th and 38th assignments of error (see printed record pages 102 and 163-4).

The following stipulation was made in open court:

It is stipulated by and between counsel for the respective parties, that such of the private and local laws or special laws of the state or territory of Minnesota, as either party might desire to call the attention of the court to, should be considered in evidence, and might be read to the court and commented upon with the same force and effect as if formally offered in evidence and made a part of the record.

Counsel for the plaintiff called the attention of the court to the following special laws of the state of Minnesota:

The charter of the Mississippi Boom Company, which is chapter 18 of the Compilation of the laws of 1851-1854;

Charter of the St. Croix Boom Company, which is chapter 29 of the private laws of 1851;

Charter of St. Anthony Boom Company, which is chapter 51 of the Laws of 1852;

Charter of the St. Croix Boom Corporation, which is chapter 141 of the Laws of 1856;

Charter of the Mississippi & Rum River Boom Company, which is chapter 56 of the Laws of 1857. (See printed record page 103.)

At the close of the case, the defendants asked the court to declare as a matter of law

That the statute under which the plaintiff claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the state, of interstate commerce, and is unconstitutional and void, being in contravention of subdivision 4, of section 8, of article 1, of the Constitution of the United States.

But the court refused to make such declaration; to which ruling the plaintiff then and there duly excepted, and this ruling constitutes the grounds for the 43rd assignment of error. (See printed record pages 104 and 165.)

ARGUMENT.

I.

The booms at the West Newton Slough, through which the logs scaled by the defendant in error, Mullen, passed, were not, and are not "any boom * * * * chartered by law" (of the State of Minnesta,) in the fourth lumber district.

This proposition lies at the very foundation of the case of the defendants in error. Unless the booms maintained by the Minnesota Boom Company at West Newton, were "chartered booms" within the meaning of section 2400, the defendant Mullen would have no right to scale the logs in question. And in determining this question, it is to the law itself, and not to what may be set forth in the articles of incorporation of the Minnesota Boom Company—that the court must look.

It is now settled by this court, beyond any possibility of controversy, that anything contained in the articles of incorporation of a corporation organized under the general laws of a state, as was the Minnesota Boom Company, which is not warranted by the statutes authorizing the formation of the corporation, is void for want of authority.

Oregon Railway & Navigation Company v. Oregonian Railway Company, Limited, 130 U. S. 1.

The only law of the State of Minnesota giving corporations of the character of the Minnesota Boom Company any authority whatever, beyond the mere power to be a corporation, is section 2 of chapter 221 of the laws of the State of Minnesota, already quoted.

It was contended upon the argument in the court below, that section 1 of the same act conferred some authority of this kind upon this corporation. Section 1 of the act simply amended section 1 of title 1 of chapter 34 of the general statutes of 1878, by inserting therein before the word "navigation" the words "or other."

Now, section 1 of title 1 of chapter 34, before this amendment, provided that

"Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building improving and operating railways, telegraphs, canals, or slack water navigation upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein," and this amendment, inserted before the word "navigation" as above quoted, the words "or other", and it was contended that the holding, handling, assorting and

booming of saw logs is a necessary part of the business of "navigating" the rivers upon which such logs may be floating.

If the legislature had stopped vith section 1, there might possible be some force in this argument, just as there was force in the argument in the case above cited, that the laws of Oregon authorized the organization of a corporation having for its purpose the construction, maintenance and operation of a railroad. But section 2 of the act of 1889, above quoted, prescribed, in the first place, the conditions precedent which must exist in order to empower a corporation to exercise the powers enumerated in that section, and then carefully defined and limited the powers to be exercised by such corporations. It provides that

> "Any corporation formed under this title, in whole or in part, for the improvement of any stream and driving logs therein, or for holding or handling logs therein, *which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements*", shall have power to do certain things, among others, to erect booms of all kinds.

The section, further on, gives to every such corporation which shall *so* improve a stream, and so keep in repair and operate its works as to render *driving* logs thereon reasonably practicable and certain the right to charge and collect reasonable and uniform tolls upon all logs, etc., *driven sluiced or floated* on the same, and to take possession of all logs put into such stream, or upon the rollways, so as to impede the *driving*, when the owners thereof, or their agents shall not have come upon the stream adequately provided with men, teams and tools for *breaking the rollways and driving* such logs in season for making a thorough *drive* upon such stream without hindering the main *drive*. And also, at the request of the owner of any logs and timber put into such streams, to take charge of the same and *drive* the same down and out of said stream, or upon such stream so far as their improvements may extend. And for such services the corporations are authorized and empowered to collect a toll.

It will be seen that the corporations of this character are *not empowered to take possession of any logs*, except for the purpose of driving. And we think, that without the limitations further on in the section, it is clear that corporations of this character are not authorized to take possession of logs driven out of one stream into another, for the sole purpose of holding, booming and assorting them, which was the sole purpose of these booms.

There is, however, another proposition which seems to us to be fatal to the contention that the Minnesota Boom Company ever acquired from the state of Minnesota any rights on this stream, or that its booms were ever, in any manner, authorized or chartered by any law of the state of Minnesota.

This statute is almost an exact copy of section 1777 of the revised statutes of Wisconsin for 1878, as amended by chapter 318 of laws of Wisconsin for 1882, the only material difference between the two laws being the proviso at the end of section 2, which is not contained in the Wisconsin law, and which seems to have been inserted by the legislature of Minnesota out of extra caution.

The rights and powers of this kind of a corporation were under consideration before the supreme court of Wisconsin in the case of

Black River Flooding Dam Association v. Ketchum, et. al., 54 Wis., 313, and it was there expressly held, that unless a corporation organized under section 1777 had taken, or could take, prior possession of the entire stream, it acquired no rights whatever upon a river under §1777. This decision having been made before the law was enacted in Minnesota, it would seem that it must be conclusive on this proposition.

The Mississippi river, at the point where these booms are erected, is the boundary line between two states, over which each state has concurrent jurisdiction, and one of the great highways of commerce of the United States. It is possible that either state might, in the exercise of its concurrent jurisdiction, by proper legislation, authorize the erection of such booms and structures as those of this Boom Company, includ-

ing the so-called shear booms stretching clear across the river, and forming, when closed, a complete obstruction to the whole river, and all classes of navigation thereon, provided such legislation recognized and protected navigation by steamboats and other water craft. Such legislation, enacted by Minnesota, has been sustained by the supreme court of Wisconsin.

Keator v. St. Croix Boom Corporation, 72 Wis., 62, but the boom charter under consideration in that case was a clear and explicit exercise of the concurrent jurisdiction by the legislature of Minnesota, and it made a most careful provision to preserve steamboat navigation; and it seems to us no court could, or would, spell out of this act any intent on the part of the legislature to authorize corporations organized and acting under it alone, to take possession of the Mississippi river at this point and erect booms, of the character, extent and magnitude of these. This view is enforced, it seems to us, by the following language contained in §2:

> "Any corporation formed for the improvement of a stream which is, in whole or in part, a boundary between this and an adjoining state, and authorized to drive logs or maintain booms or dams in such stream shall have authority to purchase and hold stock in corporation or corporations in such adjoining state, created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining state, whenever the purposes for which the corporation in this state is organized can be better effected thereby;"

Which clearly implies, that in case of boundary streams, it would be and is impossible to obtain such prior possession of the stream as the act requires, by a corporation organized under this act, and acting only under its authority. But whether this corporation could obtain prior possession of a boundary river, without uniting with a like corporation formed in the adjoining state, or not, it is clear that it was not intended by this act to confer any power upon this class of corporations to take possession of the Mississippi river below the

mouth of the Chippewa river, and interfere in any manner with its commerce.

It is questionable whether an act of the legislature of the state of Minnesota, which in terms undertakes to confer any such power as this corporation, by its articles of incorporation, assumes upon the Mississippi river at that point, could be sustained under the commerce clause of the constitution. Certainly no such question is presented here, because Sec. 2 of Chapter 221 provides that such corporations

> "shall in no case in any manner materially obstruct or impede navigation upon such stream, or erect any dam *or other obstruction* below the head of steamboat navigation;"

And further provides that

> "all dams and other works erected under the authority given by this act, shall be so constructed, used and operated as to facilitate and expedite the *driving* and handling of logs and lumber upon the stream upon which the same may be erected; and the corporation making such improvements hereunder *shall have no right to stop logs destined for points below its works on said stream, except where dams have been constructed to accumulate water for sluicing the logs, and flushing the river below the same*; and in such case, shall not detain logs in any part of the river so as to form a jam, or prevent the prompt delivery of logs destined for points below the works constructed under the authority of this act."

It would therefore seem to be clear that this law was not passed with a view to authorizing the maintenance of assorting booms, but solely with a view to authorize the formation of corporations who should facilitate, the business of driving and floating the loose logs down the streams to some place where they could be stopped and assorted. And these views of the law are enforced, not only by its terms—to which attention has already been called, but by the fact that when the Minnesota Boom Company was organized, this law was not in existence, and it could not have been contemplated that it would

acquire any power to do what is necessary to be done in order to operate such booms, from any law in existence at the time it was organized. Its articles of incorporation bear date April 5th, 1889, and were recorded the next day (see printed record pages 108-9.) The act of 1889, which it is claimed confers these rights upon this company, was passed and approved April 24th, 1889.

It is true that section 3 of this act provides that it shall apply as well to corporations organized for the purposes therein specified, before the passage of the act, as to those organized afterwards. But, if the purposes of the organization of the Minnesota Boom Company, as stated in its articles, are foreign to or in excess of the powers conferred by this act, then this section cannot help out or affect the Minnesota Boom Company.

It was also urged upon the argument in the court below, and possibly may be again urged here, that the business proposed to be done by the Minnesota Boom Company was a "lawful business," and therefore authorized by title 2 of chapter 34 of the general statutes of Minnesota for the year 1878; but this contention will be seen to be without force, when the court's attention is called to the fact that title relates entirely to corporations empowered to take private property for public use, and the class of corporations which is therein referred to and authorized, comprises all corporations of a quasi public nature; and it is title 1, and not title 2, of which chapter 221 is amendatory. On the other hand, title 2 is entitled "All corporations for pecuniary profit, other than those named in title 1"; that is, corporations for purely private enterprises; the first section in title 2, is section 109 of chapter 34; it is very long and relates to and authorizes the organization of corporations for almost every private purpose under the sun, but no one of the purposes therein referred to, or the kind of business therein authorized to be done, is ever done by quasi public corporations, except as merely incidental to their other business.

But we insist further that the words "any boom chartered by law", found in section 2400 of the statutes of Minnesota, do

not relate, and were not intended to relate to these booms, or to booms erected at that point for that purpose. We note, in the first place, that the language refers to a structure, and not to the corporation owning it.

The first provision of this character that we can find in the laws of Minnesota, is in Chapter 16 of the territorial laws of 1854. Section 10 of that act reads of follows:

> "Section 10. And the surveyor general or his deputies shall survey all logs running out of any boom now chartered or which may be hereafter chartered by law in their districts, when requested so to do, and the said boom owners shall collect their fees according to his scale; and whenever any logs are sent from any boom to the owner thereof, the surveyor shall send therewith and by the person having charge of such logs two tickets or bills containing the number of logs, the number of the raft, and the marks; and the person to whom such logs are sent, or his agent, shall acknowledge thereon the receipt of the whole, or such part thereof as he may receive, and one of said tickets or bills so receipted he shall return to the surveyor general by the person delivering said logs; and such ticket or bill so receipted shall be evidence of the delivery of said logs."

At the time this law was enacted, there were in existence four special acts incorporating boom companies, as follows:

Mississippi Boom Company, Chapter 18, Private Laws of 1851.

By section 2 of this act, this company was authorized to maintain a boom or booms at such points between the Falls of St. Anthony and the town of St. Paul, as they might select, "and in which *all logs and hewn timber coming down said river, shall be gathered by the said company*, and such logs or timber, shall not be retained in such boom, by the said company for a longer period than thirty days, unless otherwise agreed by and between the owner of such logs or timber and the said boom company."

By section 4, the company was required to sort, raft, and deliver the logs in a certain way; and by section 5, to charge fifty cents per thousand feet for so doing; section 8 contained the following provision:

"All logs or other timber passing through said boom, shall be scaled according to the pine scale, now used and known as the St. Croix pine scale, and the charges made according to said scale."

Section 8 of this act was amended in 1854 by chapter 2 of the laws of 1854, so as to contain the following provision:

"All logs or other timber passing through said boom, shall be scaled by some competent person, to be selected by the said company, when there is no authorized surveyor of lumber in office in the county or counties in which said boom is, or may be located, and computed according to the pine scale now used and known as the St. Croix Pine scale or such other scale as may be provided by law."

St. Croix Boom Company, Chapter 29, Private Laws 1851.

This act, in sections 11, 12 and 13, contains similar provisions to the act incorporating the Mississippi Boom Company, except that these booms are located upon the St. Croix river.

St. Anthony Boom Company, Chapter 51, Laws 1852, page 115 laws of Minnesota 1851-4.

This act contains substantially the same provisions as all the others. See sections 11, 12 and 13.

It will be seen that the provisions of section 10 of chapter 16 of the laws of 1854 above quoted, were principally for the purpose of furnishing evidence to the boom company of the delivery of the logs to the person to whom they were sent. The surveyor general was probably authorized by section 11 of this act, to charge five cents a thousand for making this scale, but he was given no lien whatever on anybody's logs for any scaling.

The next enactment, in order of time, upon this subject, is chapter 80 of the laws of 1858, which is entitled "An Act to regulate traffic in logs and lumber." Section 4 of chapter II of this act is as follows:

> "Sec. 4. It shall be the duty of the surveyor general by himself or deputy, to survey all logs running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the expiration of each week, to make out and deliver to the owner or agent of such boom, a bill stating the number of logs, the mark or marks thereon, and the number of feet of each mark, a copy of which bill he shall enter upon the books of his office, and the original duly certified by him, he shall deliver to the said boom owner or agent, *who shall collect the boomage, or fees of said boom in accordance with such survey.*"

It is clear from this act, that the object of it was to furnish to the boom owners some official determination of the amount of logs upon which their boomage or fees were to be computed. Nothing in this act gives the surveyor general any lien upon any logs. At the time this act had been passed, the following additional boom companies had been incorporated, viz.:

St. Croix Boom Corporation, chapter 141, laws of 1856. This act repeals the acts incorporating the St. Croix Boom Company.

The booms are located substantially at the same places.

Section 13 provided, among other things, that all logs or timber coming down the St. Croix river should, *for the purposes contemplated by the act, be deemed to be in possession of the said St. Croix Boom Corporation when said logs or other timber shall float or be driven below Rock Island*; but the owners of such logs or timber shall when the water shall permit, drive all drives of logs down to the upper end of said upper boom, or as near thereto as the logs in said boom will admit; and all logs coming down Apple river shall be deemed to be in

possession of said corporation for like purposes, when said logs shall float or be driven below Titcomb's Landing."

Mississippi & Rum River Boom Company, Chapter 60, Laws 1857, extra session.

This company was authorized by section 12 of the act, to construct and maintain a boom or booms "at such points as they may think advisable, between the mouth of Crow river and a point four miles above the Falls of St. Anthony, so-called, at which point the St. Anthony boom terminates, and any point within five miles of the mouth of Rum river, *which booms shall be sufficient to hold all logs or other timber that may float down the Mississippi and Rum rivers* and the said corporation *shall* collect all logs and other timber which shall be assorted according to their several marks, and well rafted with good rigging, and be delivered at or near the foot of said booms to owners of such logs or timber, or to such person as said owners may designate."

Section 14 of the act authorized the company to collect a boomage charge of sixty-five cents a thousand feet. There is nothing in the act making any provision whatever for scaling.

It will thus be seen, that at the time of the passage of Chapter 16 of the laws of 1854 and Chapter 80 of the laws of 1858, there was no provision of law by which the amount of the charges of these several boom companies could be officially determined, and we cannot find any act prior to Chapter 16 of the laws of 1854, creating the office of surveyor general, or defining his duties.

The next amendment of this law is section 2 of chapter 74 of the laws of 1862, which reads as follows:

> "It shall be the duty of the surveyor general by himself or deputy, to survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district, and at the end of each week when he shall have surveyed any such logs or timber, to make out and deliver to the owner of such boom or the managing agent thereof, a true and

correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the mark or marks thereon respectively, and the number of feet of each mark so surveyed during the week, and shall sign the same; and he shall immediately record such bill in the books of his office, and upon being paid his fees for such services shall deliver the original bill to the owner or managing agent of such boom, and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey."

And this act is the law now, except that by Chapter 18 of the laws of 1877, periods at which scale bills were to be made out, were extended from one week to one month, and the last clause of the section, making the scale bills evidence, was added.

Referring now to the several corporations which were in existence at the time of the passage of chapter 16 of the laws of 1854, and chapter 80 of the laws of 1858, and chapter 74 of the laws of 1862, it will be seen that each of these companies was authorized absolutely to take possession of all logs and hewn timber that came down the respective rivers into their booms, and to assort and raft out and deliver to the respective owners, the logs so taken possession of; the owners of the logs had no volition in reference to this matter, nor could these companies be held liable for any obstruction or detention of such logs, unless they were guilty of negligence in the performance of their duties.

Again, each one of these companies was authorized to charge a certain sum of money per thousand feet for all of the logs delivered out of their booms, and it was quite necessary that they should be furnished with some *prima facie* evidence, at least, of the amount of logs so delivered.

The utmost that can possibly be claimed with reference to the Minnesota Boom Company and kindred corporations, is that such a company might maintain upon its own premises, a boom for the assorting of its own logs, and the logs of such other owners as might agree with the company that they should be there detained and assorted; and such agreement could very

well include an agreement as to the method of determining the amount of logs handled, and by whom such determination should be made.

And such rights and powers under such agreements, were all that were ever claimed or exercised, either by the Minnesota Boom Company or the Mississippi River Logging Company in the name of the Minnesota Boom Company.

Proof was offered to show this to be true, and rejected, and such ruling constitutes the grounds for the 19th, 23rd, 24th, 25th, 26th, 27th, 29th and 30th assignments of error.

The corporation acquires from the state no right to boom and assort these logs; whatever right it acquires is from individuals, and it cannot be claimed that the intention of the statute under consideration, was to include within its terms such booms as these, under the definition of a "boom chartered by law." But, on the contrary, the statute was directed to corporations chartered by special act such as are above referred to—and each and all of which were given the right, within their respective territories, to take possession of all the logs that came down the river, without reference to any volition on the part of the owners thereof. This contention is further strengthened by the language of section 2400 above quoted, which provides that "all boomage, *or fees* of such boom on any logs or timber, shall be collected in accordance with such survey."

The use of the word "fees" would be very unusual with reference to the compensation of any person or persons who do not have a public, or semi public character. This goes to show that by a "chartered boom" is meant one which has been accorded quasi public duties, for which its owners have received special rights of compensation resting on public authority.

Title 5 of Chapter 32 of the statutes of 1878, which now appears commencing with section 2422 of the statutes of 1894, seems to provide for the operation of booms other than chartered booms, under the heading "Side booms." Section 2422 provides for the method of constructing side booms, and provides for the scaling therein, at the request of the owner of the boom, of all

logs belonging to any party other than the owner of the boom, and an appraisement thereof by the surveyor general, at the request of the owner.

II.

The statutes of the state of Minnesota are not intended to, and do not in fact, give the surveyor general in any district, any lien upon the logs of private parties for scaling logs which run through chartered booms.

From the very beginning of the legislation providing for the fees of surveyor general, and specifying his duties, two distinct lines of duty for the surveyor general as to the scaling of logs, appear to have been prescribed, which arise from different circumstances, in the interest of different persons, and to accomplish different purposes. These distinct lines are set forth in sections 11 and 14 of title 3 of chapter 32 of the statutes of 1866 and 1878. Section 14 has been already quoted; the other section is now found as section 2397 of the revised statutes of 1894—and will be hereafter referred to under that designation—and is as follows:

> "The surveyor general, by himself or his deputy, at the request of the owner of any logs, timber or lumber, or of any sheriff, coroner or constable, who has replevied, attached or levied on any logs, timber or lumber, or of any person who has a written order from the owner for the delivery of any logs, timber or lumber to repair to any part of his district and survey such logs timber or lumber, and, upon completing such survey, to make out a true and correct scale bill thereof, stating the person by whom, the time when, and place where such logs, timber or lumber was scaled, at whose request and to whom scaled, if to any one, and the scale mark placed thereon, the number of logs, and, when requested by the owner or any other person controlling the same, the number of pieces of logs or timber, together with the mark or marks thereon, and the number of feet therein contained, and shall sign the same; and

thereupon he shall record such bill in the books of his office, and, upon being paid his fees for such services, he shall deliver the original bill to the person to whom the logs, timber or lumber is scaled, if any; if not, then to the person requesting the survey; and such bill and the record thereof shall each be *prima facie* evidence of the facts therein stated. No surveyor general or deputy surveyor shall in person survey any logs, timber or lumber owned wholly or in part by himself, but either may survey any such logs, timber or lumber, owned wholly or in part by the other; provided, that where logs which have been cut in any lumber district in this state have been run out of said district, it shall be lawful for the surveyor general of the district in which said logs were cut, when requested so to do as above provided, to scale said logs, by himself or deputy, and record the scale bill thereof in the books of his office; and said scale and record thereof shall be received as of the same degree of evidence as if the same had been done in his own proper district."

The purpose of section 2397 is indicated in the clause following the completion of the statement of the duties of the surveyor general: "And such bill and the record thereof, shall each be *prima facie* evidence of the facts therein stated." One of the facts to be stated in the scale bill, made under this section, is "the scale mark placed thereon," clearly indicating the duty of the surveyor in making a scale at the request of the owner, to place a scale mark upon the logs. The significance of the scale mark referred to in section 2397 is shown by referring to section 2401 of the statutes of 1894 (which was section 15 of chapter 32, general statutes of 1878), which provides that in cases of sales or transfer of logs or timber by one party to another, the surveyor general who surveys the same shall, at the time of making such survey, place upon each of such logs the scale mark of the purchaser or other transferee, and "thereupon such scale mark shall supersede all prior marks upon such logs and timber," and become and be the log mark of such purchaser.

The purpose of section 2400 is indicated in the clause which follows the completion of the statement of the duties of the surveyor general, as therein set forth: "And all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey."

The clauses quoted are the key to the meaning of each of these sections, and, analyzing the sections, we see, as indicated by these clauses, that section 2397 provides for an official scale of any certain lot of logs, timber or lumber which the owner may wish to have certified to; while section 2400 merely provides a scale in accordance with which the owner of a boom may collect charges for handling a certain mark of logs which the law has given him a right to collect.

Section 2397 provides a scale upon a certain limited quantity of logs, timber and lumber, probably of various and miscellaneous marks; section 2400, a scale not limited as to quantity, but on all the logs of each particular mark which run through the boom in a certain space of time. The scale called for in section 2397 may be had by the "owner of any logs timber or lumber," etc., by making a *request*; the duty of the surveyor general does not begin until such request has been made. The scale provided for in section 2400, can be had by the owner of a boom, whose request takes the form of procuring a charter from the state, by which he shall be permitted to collect boomage from all logs passing through his boom; *until* such a charter has been procured, the law provides no means by which he can secure this scale of the surveyor general; *when* such a charter is procured, the surveyor general's duty becomes effective at once.

The purpose of the law being indicated by the phrases first quoted, makes it plain that two different sorts of scale are intended for the benefit of parties who, under these two different circumstances, need an official scale for the convenient transaction of their business. There is nothing to indicate any purpose relating to other parties than those thus interested in either of these directions. The phrasing in other sections of the law, bears out this construction.

In section 2402, fees for the surveyor general's services

are provided, with a lien for their enforcement, "5 cents per thousand feet for all logs and timber *required to be surveyed*," i. e., by request from owner of the logs, or, by the owner of a boom procuring a charter for the collection of boomage.

Section 2404, provides that the surveyor general "*shall not be required* to scale any logs to any other person than the owner."

Section 2412 provides, that in all cases the fees shall be paid by the "party *for whom* the logs are scaled," i. e., at whose request and for whose benefit.

Again, there is no reason for supposing that section 2402 (the section which provides for the lien) is intended to apply to the scale called for in section 2400, except that it is the only paragraph in which the amount of fees is provided for; otherwise the language of the section conforms with that of sections 2397, 2401, 2404 and 2412, all of which imply, or expressly require, a request by the owner of the logs, and imply that the scale is for the benefit of the party making the request.

To construe the law so as to permit the seizure and scale of the logs to collect fees for the boom scale, implies—indeed, it is expressly asserted in this case—that you may seize one man's goods for the debt of another man, for in fact it never happens that a boom company owns any considerable quantity of the logs which pass through its booms.

Take the case at bar. According to the notice served by the surveyor general, he has seized and claims to hold, of the Lindsay & Phelps logs, 1,316,510 feet, to pay his fees for scaling 221,778,800 feet, amounting to $11,088.42, thus putting his entire lien on .006 of the logs scaled. His fees for scaling the logs actually taken, would have been only $65.82.

This would mean that the statute could require a log owner to pay boomage to a boom company, enforceable by a lien (for the law applies only to chartered booms), and then give the surveyor general a lien on yet other of his logs to enforce a bill against the Boom Company for scaling, not alone

his logs, but chiefly those of others. If the owner has paid his boomage, he has paid for the boom scale of his own logs, that being one of the elements in the cost of boomage.

So that, even though it might be determined that under this law the surveyor general would have a claim against the Minnesota Boom Company for the amount of his fees, it cannot be possible that there was any intention to give him a lien upon these logs.

The proposition, tersely put, is that the legistature has authorized the taking of the property of A, for rendering services upon his property and that of B, for the benefit of C., and no such law ever has been, or can be maintained.

Appleman vs. Myre, 74 Mich., 359, would seem to be a case directly in point. The question presented in that case was, whether a laborer, working on a large drive of logs consisting of various marks and belonging to different owners, and who has a lien for his services thereon, can enforce that lien *in whole* upon one or more particular marks of logs belonging to one or more of the persons interested in the whole drive. It did not appear that the contract for the driving of the logs was made jointly with the various owners of the logs, and the court said (page 364):

"While this is undoubtedly true that in the enforcement of these liens the laborer may take only a part of the property upon which he has expended labor, and may collect from such part the value of the labor expended upon the whole, yet this must be limited to the labor done upon one owner's logs. He cannot be permitted to seize and subject to his lien the property of one owner to pay for labor expended upon the logs of another owner. These are matters that must be determined at the trial. The plaintiff, on the trial, has the burden of showing how much, or what proportion, of his labor has been expended upon the logs or lumber of each owner, and, this being ascertained, he may have his lien assessed upon such product for the value of labor expended thereon? It appears that there were eight owners or these logs in the drive. Four only were served with process, and appeared in the action. Some testimony was given showing, or tending to show, how many logs each had in

the drive. Several hundred thousand of these logs were not subjected to this lien, nor seized under the writ. The justice was in error in subjecting the logs actually seized to the payment of the debt of the other owners whose logs were not seized. *The property of one man cannot be taken to pay the debt of another unless some fact appears showing some privity of contract between them.*"

And it will be remembered, that defendants' counsel, upon the opening of their case, expressly admitted that there was never any request from anybody to the surveyor general, to scale these logs.

III.

If the propositions heretofore made in this argument, should be resolved against the plaintiff in error; then it is confidently asserted, that upon this record the defendants have not shown that the defendant Mullen complied with the statutes of the state of Minnesota which, it is pretended, give him a lien on these logs, so as to be entitled to any lien thereon, or any right of possession thereof.

It is not shown, by any competent evidence, that he ever scaled any of these logs. The only evidence of that fact is the scale bills introduced in evidence, defendants' exhibits 3 and 4.

The only statute that makes these scale bills evidence, is section 2400. This statute, which was enacted in 1877, expressly provides that,

"All scale bills *heretofore* made and signed by any such surveyor general, or the record thereof, in the respective offices of such surveyor general, or copies of such records duly certified, shall be *prima facie* evidence of the matters stated in such scale bill, record or copy."

It will not be contended that without this statute these scale bills would be any evidence of the matters contained in them until verified and shown to be correct, by the men who did the work.

It was argued in the court below, that because section 2403, which is as follows:

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages, and orders, and other instruments in writing for the sale, transfer, incumbrance or delivery of any logs or timber in the same district.

Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and effect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and authorized to be

kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this state, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all courts of this state, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated."

Makes certified copies of any matter or thing of record in the office of the surveyor general, *prima facie* evidence of the matters and things in such record contained, and therefore because a copy of the record of these scale bills—if any such record had ever been made—would be evidence, the original must be evidence.

We have searched diligently for any authority to sustain this proposition, and we can find nothing that comes any nearer to it than this:

If a paper, which in and of itself is evidence, as a contract or a deed, is recorded or authorized by law to be recorded, and the record or a certified copy thereof is made evidence, this does not take away from the paper recorded its original character as evidence, and it is not necessary to produce the record. But this does not establish any such proposition as that already made.

But, if these scale bills are evidence of the scale of these logs, they are nothing more, and the making of these scale bills and delivery thereof to the managing agent at the boom, are only two steps in the performance of the duties prescribed by section 2400.

Section 2400 requires the surveyor general, after having

made the scale of logs as therein directed, at the end of each month to,

"Make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month *and shall sign the same, and he shall immediately record such bill in the books of his office, and upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom.*"

Here are certain duties to be performed by the surveyor general in order to entitle him to his fees. He must, in addition to scaling the logs, make out a scale bill showing certain things specified in the statute, and he must, before the delivery of the scale bill to the boom company, record the scale bill in the books of his office. And he must *not* or at least he need not deliver the scale bill to the Boom owner until his fees are paid. Perhaps no better reason can be given for the requirement that he should record the scale bill, than that contained in defendants' answer, where it is alleged that the legislature of the state has duly passed the laws referred to in the answer, requiring the surveyors general to make these scales, "and, furthermore, to keep a true and correct public and official record of all acts done and proceedings had and taken in connection with such scaling" (Printed record page 9).

On the same page it is alleged, that it is for the best interests of the owners of logs, and all persons, firms and corporations interested therein, that they should be gathered together in some safe place, and there assorted, brailed and scaled, "for the purpose, among other things, of ascertaining the amount of merchantable lumber in each log contained, *and keeping a true and correct record*, description and account thereof."

The only possible reason that can be given why a log owner should be required to have his property taken and disposed of to pay the fees for scaling somebody's else logs, for the benefit of still another party, is that after the scaling is

done a record is made which may be of some benefit to the log owner.

Now, it is clear that no such record was ever made of either of these scale bills.

First, and with reference to the May scale bill, exhibit 4, it does not appear from the evidence that what purports to be the record of it, is in fact the record of the whole of it, and as a matter of fact, it is not

Second, as to the June bill, exhibit 3, this pretended record is devoid of all of the requirements of a record. In the first place, there is nothing in it to show that it is a record of a scale bill of the surveyor general of logs and lumber of the fourth district, or that it is a scale bill of logs running out of any chartered boom; all of the original bill that tends to show any such thing, is omitted from this copy. In the next place, it is not a copy. A reference to the original book, exhibit D, which is on file, and a comparison thereof with the copies of the sheets of the original exhibit, which are found from pages 114 to 128 of the printed record, will show that it would be impossible for any man to identify his logs, or to say how many of them, or what quantity of them, were shown upon any one of these pages. Take, for example, sheet 30, page 116 of the printed record; the original bill only shows one column of log marks and figures; the letter press copy shows two columns, and one is just about as plain as the other. Take sheet 33, page 117, the original bill shows only half a column of log marks and figures, while the letter press copy shows two distinct columns. The same thing is true, to almost as great an extent, of sheet 36, page 119, and to a still greater extent of sheet 40, page 121, and sheet 60, page 126. And we submit, with the utmost confidence, that there is nothing in this book which shows that any record whatever of this scale bill, which is worthy of the name of a record, was ever made.

The pages of this same book which were offered, and which are found in the record as defendants' exhibits A 1 and B 1 (page 148 of the printed record) do not in any manner help out the defects in this record; they were utterly incompetent and inadmissible any way, because there is no provision

in the statutes of Minnesota for the recording of any such papers; if they were offered as a record, they are not a record; they are not properly any part of the scale bill, nor of the record of it, and the fact that the surveyor general has copied in his letter press book, a paper which is not authorized to be recorded and which refers to some other paper as a scale, and contains certain statements, cannot aid a defective record of that paper, especially where the defect in the record is of a character that is not at all aided by such a paper. And the defect in this record, in that it fails to show the marks or number of feet scaled, as shown in the original bill, is not in any way aided by any statement in these papers.

Again, section 2402, in providing for the seizure of logs to secure a lien, provides, in substance, that such seizure shall not be made until after the scale bill, together with the notice required to be affixed thereto, shall have been delivered.

Now, it appears from this record, as already stated, that these logs were seized from three or four days to a week before the June scale bill was delivered to the Boom Company, and before either of the notices that a lien was claimed upon the logs (defendant's exhibits 5 and 6) were delivered to the Boom Company. In other words, the surveyor general had taken possession of the property before he had performed the acts which were necessary in order to fix his lien.

And here, again, we are met with the remarkable proposition that A, having performed services for B, and for the benefit of B, upon the property of C, and others, may seize some of the property of C., without notice to C. that B. has not paid for the services—and indeed, without notice to anybody—and subject the property of C to the payment of the whole debt.

If this is not taking property without due, or any, process of law whatever, we cannot imagine a state of facts which would amount to that.

When the defendant Mullen had delivered these two scale bills exhibits 3 and 4, to the owner or managing agent of this boom, he had placed it beyond his power to record the bills, or

to furnish to the plaintiff in error here, or anybody else interested in the logs—except the Boom Company—any information whatever which would be of the slightest benefit to the log owner.

We insist, further, that the remedy for the surveyor general through which he should secure his fees for the scaling done under section 2400 is to retain the scale bill in his own hands until his fees are paid by the Boom Company. It is clear from the section, that the scale bill is made, primarily, for the benefit of the boom owner. It provides that "All boomage of fees of such boom on any logs or timber shall be collected in accordance with such survey." It is of little or no use to anybody else. It furnishes no clue, even if recorded, to the imme diate raft or brail of logs in which those bearing the bark belonging to any individual, are to be found; indeed, upon the trial it was practically admitted, that it would be impossible to find out where (that is, in what brail) logs of a given mark were scaled, without examining in detail every one of the original tally sheets.

It was contended, in the case at bar, that because section 2402 was a part of the same general enactment as section 2400, it should be read in connection with it, and the provisions found in section 2402 for fees and a lien, should be taken and deemed to relate to the fees for scaling under section 2400. We have already pointed out the two different lines of duties in reference to scaling logs by surveyors general, as provided in this general enactment, and cannot subscribe to this proposition.

But, section 2406 of the statutes of 1894, is as follows:

> "No logs shall be scaled by the surveyor general or his deputies, unless the marks upon the said logs are property recorded in accordance with the provisions of this title; and no survey of any logs shall be received in any court in this state except the survey of the surveyor general or his deputy."

This section was section 20 of chapter 32 of the statutes of 1878, and is a part of the same general enactment as the

other sections already quoted. The sections already quoted are found in title 3 of chapter 32 of the revised statutes of 1878 and of 1894. We find no other provision in title 3, for the recording of log marks, except the first subdivision of section 2403 above quoted; but section 27, chapter 32 of the general statutes of 1878, which is now section 2413 of the statutes of 1894, reads as follows:

"Whoever cuts any logs in either of the districts of this state shall, before proceeding to mark the same, cause to be recorded in the office of the surveyor general in whose district such logs may be, a copy of the log mark which is to be put upon said logs, and which mark shall be distinctly different from any other mark recorded in the same district. Whoever cuts any logs in any state adjoining either of the districts of this state, and intends to bring such logs into any such district, may have his log mark recorded in the district into which he intends to bring such logs and into which they may be brought, with the same rights, force and effect as if such logs had been cut in such district. And when any log mark is recorded in pursuance of the provisions of this chapter, such mark shall be deemed and held to be the property of the person in whose name it is recorded; and such mark borne upon any logs or timber, and not superseded by any other mark, shall be *prima facie* evidence that the logs or timber bearing such mark are the property of the person owning the mark. Any such log mark may be sold or transferred by bill of sale recorded in the office of the surveyor general where the mark is recorded, executed by the person in whose name the same is recorded, and a note of such transfer made in the margin of the book where said mark is recorded, or by the order in writing, signed by the person owning such mark, directing the surveyor general to transfer said mark to any person therein named; and upon receipt of such order said surveyor general shall record the same in his office, and transfer said mark upon his books of record of log marks to the person named in said order, upon receiving his fees therefor. And such

sale or transfer of any mark so made shall operate as a sale or transfer of all the logs bearing such mark, and at the time owned by the person transferring the same. Any logs or timber cut in this state, or coming into this state in the first district, at any point on the lake or river St. Croix above the city of Stillwater, the marks of which are not recorded in the district in which they were cut or into which they may come, and all logs or timber not bearing any distinctive mark shall not—in favor of the person who has cut the same or who claims to be the owner thereof—be recognized deemed or held in any of the courts of this state to be the property of any such person for any purpose whatever in any action or proceeding."

It will be seen from a reference to this section, that it is not compulsory upon anybody cutting logs in another state, and bringing them into this state, to record their log marks in this state except where the logs are brought in to the first lumber district.

The plaintiff in error offered to prove by the defendant Mullen, both upon his cross examination, and in rebuttal by calling him as its own witness, that no log marks whatever were recorded in his office, and the testimony was rejected as immaterial.

The defendant Mullen did not think it was immaterial when he interposed his answer, for in that answer he alleged specifically:

> "*That there are and for many months prior to the 17th day of April, 1893, have been and ever since that time have been on file and of record in the office of this defendant, as surveyor general as aforesaid, under and pursuant to the statutes of the state of Minnesota in such case made and provided, several hundred different marks, each of a peculiar and unique character, but distinguishable one from the other and indicating said different ownerships.*"

Upon the trial it was urged that this section 2406 applies to scales made by the surveyor general pursuant to the pro-

visions of section 2397, but certainly, the same argument that would authorize the court in saying that because section 2402 (the section which provides for the fees of the surveyor general and a lien) must be taken to refer and apply to the scale made under section 2400—because it is a part of the same general enactment—would compel the court to say, that under no circumstances should the surveyor general scale any logs unless the log marks were recorded.

Again, plaintiff offered to show that the scale bills offered in evidence (defendant's exhibits 3 and 4) were grossly incorrect (see printed record pages 97, 98, 99, 100, 101, plaintiff's exhibits "E", "F" and "G", and 32nd and 33rd assignments of error).

So that the court may understand this testimony, we make this explanation:

The witness Stewart testified that he made Exhibit F from defendants' exhibits 3 and 4; that is, he selected out of the various marks with the numbers of logs and number of feet set opposite them on either exhibit 3 or 4, the several marks with the numbers of logs and feet set opposite them in Exhibit F; and a reference to exhibits 3 and 4 (the originals of which are on file) will show this to be true. This exhibit F shows (for example) that—as appears from defendants' exhibit 4—on the 22nd day of June, 2,789 logs containing 344,950 feet, and marked J N, were scaled by Mullen; and that—as appears from defendants' exhibit 3—on the 23rd day of May, 1,124 logs containing 176,460 feet and marked Y Z, were scaled by Mullen. Plaintiff proved by Yates and Sinclair, that these marks were not recorded in their offices (printed record page 101, plaintiff's exhibit "G" page 146, printed record 97, and plaintiff's exhibit E, page 144); and offered to prove by Mullen that none of these marks were recorded in his office; and by Stewart, who had kept the log books at West Newton and Beef Slough, that he never saw any such marks (printed record pages 98-9); and by Phitts, whose duty it was to know and see every mark going through the boom, and direct where it should go, that he never saw any such marks (printed record pages 99-100); and by Daly, who was Mullen's chief deputy in charge of his scalers, that they

were an inexperienced lot who did not, and could not, make a correct scale (printed record pages 100-101.)

The scale bills (exhibits 3 and 4) are at best only *prima facie* evidence; *sec. 2400 supra*; and it is remarkable if plaintiff's logs can be charged with a lien for scaling logs that did not exist upon such *prima facie* evidence, when the evidence is at hand and offered to show errors amounting, in exhibit 4, to over 730,000 feet, and in exhibit 3, to over 390,000 feet.

Plaintiff also offered to show by the witness McMillan, that the scaling was not done as required by the laws of Minnesota (printed record pages 101-2). The statute of Minnesota prescribing the manner in which logs shall be scaled, was at the time this scaling was done, sections 12 and 13, chapter 32, G. S. 1878—now sections 2398 and 2399 statutes of Minnesota 1894. These sections read as follows:

> "Section 2398. Rules for surveying—Record of survey.
>
> "The said surveyors and their deputies shall, in surveying or measuring logs or lumber, make such allowance for hollow, rotten and crooked logs as would reduce and make them equal to good, sound and straight merchantable logs; and in surveying lumber, shall throw off all rotten, shaky or wany stuff, and make the same equal to good merchantable lumber. And the figures showing such survey shall, at the time of making the same, be entered by the surveyor in pass-books kept for the purpose, which books shall be preserved and filed by the surveyor general in his office, for the inspection of all persons interested therein."
>
> "Section 2399. Written rule to be posted—Scribner's rule adopted.
>
> "The surveyor general shall keep posted in his office a written rule or scale of logs of all sizes and lengths, which shall govern him in his surveys, and the scale-rule known as Scribner's rule is hereby adopted as the only legal rule for the survey of logs in this state;

provided, that every log shall be surveyed by the largest number of even feet which it contains in length over ten feet and under twenty-four feet, and all logs of twenty-four feet in length or more shall be surveyed as two logs or more."

The evidence offered would have shown that this law was not complied with.

To recapitulate the argument on this branch of the case:

1. There was no competent evidence that the logs were in fact scaled. Exhibits 3 and 4 were not evidence of that fact under the provisions of Sec. 2400, and that is the only law making them evidence. And exhibits 5 and 6 are not evidence of anything under any statute (assignments of error Nos. 5, 6, 7 and 8).

2. Plaintiff should have been permitted to show that there was never any authority to scale these logs because the log marks were never recorded in Mullen's office (assignments of error 9 and 31).

3. Mullen did not so perform his duties as to entitle him to a lien in that he never recorded the scale bills (Subd. b and d, 42nd assignment of error, and 41st assignment.)

4. The statute does not give a lien on logs of a private party for scaling logs running through a boom; hence it was error to admit any evidence of scaling them, and judgment should have been ordered for plaintiff (assignments of error 5, 6, 7, 8 and 13).

5. The only remedy for Mullen to recover his fees, was by retaining the scale bills until the Boom Company paid him. Hence, he could have no lien on or right to plaintiff's logs (13th assignment of error).

6. The plaintiff should have been permitted to show the gross inaccuracies in the scale bills, and that they were not made as required by law (assignments of error 32, 33, 34, 35 and 36).

IV.

If the booms at West Newton were chartered booms, within the meaning of section 2400, and if the defendant had properly scaled the logs that ran through it, had recorded his scale bill and had otherwise complied with the statute, and if, by the terms of this law, the surveyor general would be entitled to a lien upon this property for his fees for making such scale and recording, then we insist that the law, as applied to this locality, is a regulation of interstate commerce, which the legislature of the state of Minnesota has no authority whatever to make.

It is too clear for argument, that the logs passing through these booms are subjects of interstate commerce, and of nothing else.

McCall vs. California, 136 U. S. 104.

The definition of commerce, as laid down by Prof. Pomeroy in his constitutional law, section 378, is adopted; this definition is as follows:

> "It includes the fact of intercourse and of traffic, and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments and places by and in which intercourse and traffic are carried on; and further, still, comprehends the act of carrying them on at these places, and by and with these means; the *subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons.*"

In *County of Mobile v. Kimball, 102 U. S., 691* it is said that

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms *navigation*, and the transportation *and transit* of persons and *property.*"

In *Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-203*, the definition is:

"Commerce among the states consists of intercourse and traffic between their citizens, *and includes the transportation of persons and property, and the navigation of public waters for that purpose.*"

And all these cases are cited with approval in the late case of,

United States v. E. C. Knight Company, 156 U. S. 1, where the court say:

"What is commerce among the states? The decisions of this court fully answer the question, commerce undoubtedly, is traffic, but it is something more, it is intercourse. It does not embrace the completely interior traffic of the respective states—that which is 'carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states'—but it does embrace 'every species of commercial intercourse' between the United States and foreign nations and among the states, and, therefore, it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the people of the United States. 'Commerce, as the word is used in the Constitution, is a unit,' and 'cannot stop at the external boundary line of each state, but may be introduced into the interior.' 'The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the states generally.*"

"These principles were announced in Gibbons v. Ogden, and have often been approved. It is the settled doctrine of this court, that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is affected. In County of Mobile v. Kimball, 102 U. S. 691,702, it was said that 'commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic

> *including, in these terms, navigation and the transportation and transit of persons and property, as well as* the purchase, sale, and exchange of commodities." In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, the language of the court was: 'Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, *and the navigation of public waters for that purpose*, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions."

None of the logs which came into these booms had ever become a part of the common mass of property in the state of Minnesota until after they were assorted, rafted and delivered to their respective owners—if they ever did. They were brought down to these booms out of the state of Wisconsin, in a common mass, and there stopped for the express purpose—and only for the purpose—of assorting the same out according to their several ownerships, putting them into rafts and fitting them for transportation down the Mississippi river.

There is absolutely no evidence worthy of mention, in these cases, that a single log ever got into these booms that came from the state of Minnesota.

The plaintiff has introduced exhibit 9, from which it appears that three different log marks were recorded in the office of the surveyor general of the second district before the year 1893, which log marks are found in the brails of logs belonging to the plaintiff in this case, but there is no evidence that any logs bearing any of these marks ever went below Minneapolis; and the evidence is overwhelming, that many logs bearing these marks, and each of them, came out of the Chippewa river; and this evidence is supplemented by the fact that these log marks were recorded upon the Chippewa River (printed record pages 147-8, plaintiff's exhibits H & I).

The plaintiff also offered further proof on this point, which was rejected. (See printed record pages 57-8, assignments of error XV and XVI, page 155, and printed record page 102, and assignments of error XXXVII and XXXVIII, pages 163-4.)

This evidence would have effectually disposed of any lingering doubt as to this question of fact.

It is true that there is some evidence, that in towing rafts of logs down the Mississippi river, some logs escape from rafts, and it is possible that the inference has been raised, that some of these logs that escape from the rafts had at times gotten into these booms, *but these logs which escape from these rafts are equally subjects of interstate commerce with the logs which come down the Chippewa River;* all of the logs which escaped from these rafts have been scaled and delivered to their respective owners, and they have received their pay for them; they have sold them to parties engaged in manufacture down the river, and those parties, or their agents, are engaged in towing them past these booms. This traffic is equally as much interstate commerce, as the traffic of floating the logs out of the state of Wisconsin into and through the state of Minnesota, and while in the state of Minnesota, detaining them for the purpose of assorting.

Again, it appears conclusively, that the power to identify these logs by their marks as belonging to any particular owners, is gone when they have been rafted, and different rafts, containing the same marks, sold to different purchasers. See, as to the Mississippi River logs, testimony of Richard Chute, (printed record page 80), where he says:

"I was manager of the Mississippi River Lumber Company. Eventually the logs of that company went to points down the river to various parties; they were rafted without sorting; they were put together just as they were in the boom without putting on any particular mark. If the Mississippi River Lumber Company sold these rafts or these brails of logs to different parties or individuals, then different parties or

individuals had the same mark of logs that they took down the river."

And, as to the St. Croix river logs, the testimony of H. J. McKusick (printed record page 85) where he says:

"After being rafted they were sorted and rafted and scaled and they were delivered to the members of the firm comprising the Musser-Sauntry Company, and about two-thirds of the total amount was taken down to the mills in Iowa and Illinois of Weyerhaeuser & Denkman and Dimmock, Gould & Company, and some to the Musser Lumber Company of Muscatine. The balance was sold on a log scale and went to other points Musser-Sauntry logs were all put together. They rafted with reference to their own logs. For instance, Musser & Sauntry would have half a dozen different marks; they were all rafted together, these half dozen marks; then when these different members of the company took away logs Weyerhaeuser would take some of the same marks that Dimmock, Gould & Company did. Musser-Sauntry logs were sold to different buyers, mostly down river parties having mills located along the river. Mostly sold to saw mills located on the Mississippi river in Iowa and Illinois and some in Missouri. *That was generally true of all logs I handled there. I think it is generally true of all logs that are taken below.*"

If these logs, or the ownership thereof can not be identified by their marks, then there can be no purpose to be served, or object to be attained, by the scale attempted to be made by the defendant Mullen, except to impose a burden upon interstate commerce, and the imposition of any such burden, in any form, is expressly prohibited by the provisions of the constitution of the United States, as construed by this court.

In the leading case of,

Wabash etc. Railway Company v. Illinois, 118 U. S. 557, on page 571, Mr. Justice Miller, delivering the opinion of the court, after considering many cases, says:

> "But we think it may safely be said, that state legislation which seeks to impose a direct burden upon

interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position; it does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within; while it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent, in the management of his business throughout his entire voyage. It was to meet just such a case, that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and and its tributaries reach many more; the commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers, while within its jurisdiction, the confusion likely to follow, could not but be productive of great inconvenience and unnecessary hardship."

This case has never been questioned, and its scope has been extended to almost every kind of commerce between the states.

Robbins v. Shelby County taxing District, 120 U. S. 489.

Fargo v. Michigan, 121 U. S. 230.

Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326.

Railroad Co. v. Husen, 95 U. S. 465.

Bowman v. Railway Co. 125 U. S. 465.

Le Loup v. Mobile, 127 U. S. 640.

Asher v. Texas, 128 U. S. 129.

Stontenberg v. Hennick, 129 U. S. 141.

W. U. Tel. Co. v. Alabama, 132 U. S. 472.

McCall v. California, 136 U. S. 104.

Norfolk R. R. Co. v. Pennsylvania, 136 U. S. 114 (reversing S. C. 114 Pa. St. 256).

Lyng v. Michigan, 135 U. S 161.

Crutcher v. Kentuckey, 141 U. S. 47.

Brennan v. Titusville, 153 U. S. 289.

Pollock v. Farmers L. & T. Co. 157 U. S. 429.

It was forcibly urged in the court below, and doubtless will be here, that this law is an inspection law which is excepted from the prohibition imposed upon the states, from regulating commerce. No better definition of an inspection law exists, than that of Chief Justice Marshall, in

Gibbons v. Ogden, 9 Wheaton, 1-203, and the definition has been quoted and followed in many subsequent cases, notably in,

Bowman v. Railway Co. 125 U. S. 465, where this court said:

> "The object of inspection laws", said Chief Justice Marshall in *Gibbons v. Ogden, 9 Wheaton 1, 203,* "is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. *They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose.*" They are confined to such particulars as, in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption."

Railroad Compauy v. Husen, 95 U. S., 465, where the court, on page 472, said:

> "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under con-

tagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self protection it may establish quarantine and reasonable inspection laws, *it may not* interfere with transportation into or through the state, beyond what is *absolutely necessary for its self protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * * * * The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. * * * * * * The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

And as to *when*, and upon what subject such laws may be enacted and applied, see,

Robbins v. Shelby Taxing Dist., supra, where the court say:

"The state may, notwithstanding this constitutional provision, by virtue of its jurisdiction over persons and property within its limits * * * pass inspection laws to secure the due quality and measure of products and commodities. * * * * But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; *nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein.*

"In a word, it may be said, that in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of

regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject."

Some cases cited by counsel in the court below to sustain their contention, ought perhaps to be noticed.

Woodruff v. Parham, 8 Wall. 123. This case holds:

> "The term 'import' as used in that clause of the constitution which says that 'no state shall levy any imposts or duties on *imports* or exports,' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. Hence, a uniform tax imposed by a state on *all* sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid."

It is to be noted, that the term 'imports' which is here construed, occurs in another provision of the constitution, and it may well be doubted whether the doctrine of this case can be applied to the question as to what constitutes interstate commerce; but if it can, the case must be considered as overruled by the cases of,

Bowman v. Railway Co. supra and Leisy v. Hardin, 135 U. S. 100.

In this latter case, Mr. Chief Justice Fuller states the question to be as follows:

> "Being thus articles of commerce, can a state, in the absence of legislation on the part of Congress, prohibit their importation from abroad *or from a sister state?* Or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad or *from a sister state,* so become part of the common mass of property within a state as to be subject to its unimpeded control?"

And the syllabus shows the conclusion reached by the court.

Gibbons v. Ogden, 9 Wheaton 1.

It was contended in the court below, that this case decides that in the absence of congressional action, the states may pass laws which operate as regulations of interstate commerce. We think it may well be doubted whether the case warrants any such conclusion; but if it does, it is not now the law as to this proposition and has not been since the decision in,

Wabash etc. Ry. Co. v. Illinois, 118 U. S. supra. See further on this point:

Robbins v. Shelby County taxing Dist. supra;

Bowman v. Railway Co. supra;

Leisy v. Hardin, supra;

Brown v. Houston, 114 U. S. 622, must be considered overruled as is *Woodruff v. Parham, supra,* upon the first proposition, if it is claimed it applied to the clause of the constitution now under consideration. And, upon the proposition that a tax on interstate commerce, in order to be bad must discriminate against the articles imported, or the business of carrying on such commerce, this case is certainly overruled by,

Robbins v. Shelby County Taxing Dist., and its kindred cases above cited.

Turner v. Maryland, 107 U. S. The law there in question answered the definition of an inspection law given in Gibbons v. Ogden, because it operated upon tobacco grown in Maryland before it became an article of commerce. This is clear, not only from a reading of the law, but from the opinion of the court upon pages 48, 49, 50, 56, 57 and 58, and the court winds up its opinion by saying, that no inspection is involved except that of tobacco grown in Maryland, and that the court must not be understood as expressing any opinion as to any provision of the Maryland laws which refer to the inspection of tobacco grown out of Maryland; and in,

Voight v. Wright, 141 U. S., 62, it is said, that the question is still open as to the mode and extent in which state in-

spection laws can constitutionally be applied to personal property imported from abroad, or from another state.

Pittsburgh & Southern Coal Co. v. Louisiana, 156 U. S. 590.

This case is distinguishable from the case at bar, because the statute there under consideration only provided for the measurement of the cargoes *when they were sold.* It did not authorize the inspectors to inspect *every* boat, or any boat *unless it was sold*, or unless requested by the owner. In the case at bar the right is sought to be established to measure and charge, indiscriminately, every log, no matter whether sold in the state or not, or whether the owners request it or not. Indeed, two-thirds of the logs are owned by the same parties who owned the boom, (printed record page 56) and the assorting is a mere division between themselves of their property, while it is in process of transportation.

Pittsburgh Coal Co. v. Bates, 156 U. S. 577.

That case is clearly distinguishable from the case at bar, because in that case the property sought to be taxed had arrived at the state of its ultimate destination. See the language of the court in this case, on page 588, where it is said:

> "And it was held, that as to the character and mode of the assessment it was not a tax imposed upon the coal as a foreign produce or as the product of another state than Louisana, nor a tax imposed by reason of the coal being imported or brought into Louisana, *nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxable for the current year as all other property in the city of New Orleans was taxable."*

Neilson v. Garza, 2 Woods, 287.

If this case could be said to be an authority upon the question here under consideration, its weight would be very much lessened by the fact that it proceeds on the false assumption, that in the absence of congressional legislation, the state may pass laws which have the effect to regulate interstate commerce. But the case is distinguishable upon another ground: There, the goods were brought into the state and left there, and liable to become intermingled with the property of citizens of Texas, so that frauds might occur in their exportations. No such condition of things exists here. As already shown, the logs here in question were shipped in Wisconsin to plaintiff's mills in Davenport; there was no probability—hardly a possibility—of their ever becoming intermingled with the property of citizens of Minnesota, or with property that had ever become a part of the common mass of property in Minnesota; at least until after such property had been segregated from the common mass and again become itself a subject of interstate commerce.

Patapsco &c. Co. v. Board of Agriculture, 52 Fed. 690.

The law under consideration was not in any sense an inspection law, but it was a part of a law which did provide for the inspection of goods brought into the state for sale, "to fit them for domestic use," and answers the definition in Gibbons v. Odgen. And the law or particular section of the law—under consideration in that case—was considered entirely upon the proposition, whether it imposed an unreasonable tax upon importers.

It appeared from plaintiff's evidence in rebuttal—and which was not contradicted—that no logs came into the Mississippi river above the mouth of the Chippewa, except,

1. Such as are cut and put into the Mississippi river and its tributaries above Minneapolis (printed record pages 92 and 93). These logs are all assorted, either at the booms of the Mississippi and Rum River Boom Company at and immediately above Minneapolis; or at the booms of the St. Paul Boom Company, immediately below St. Anthony Falls. Those that are assorted at the upper booms, are delivered to their sever-

al owners there and manufactured into lumber at Minneapolis. Those that are turned over the falls, and assorted at the lower booms, are put into rafts and towed down the river to various points, many of such rafts passing the West Newton Booms. In either case, as fast as they are assorted, they are scaled by the surveyor general of the fourth lumber district, and every log accounted for to its rightful owner (see evidence of B. F. Nelson, printed record pages 76-7, and Richard Chute printed record pages 79-80).

2. Such are cut on the St. Croix and its tributaries above Stillwater (printed record pages 92-3). These logs are all gathered together in the booms of the St. Croix Boom Corporation, just above that part of the river known as Lake St. Croix, and there assorted and delivered to their various owners. After being assorted, and before a log is manufactured or taken out of the lake, they are scaled and accounted for to their owners by the Surveyor General of the first district, such scale being required by Section 2411 of the statutes of 1894, which applies only to the first district (see testimony of Chas. A. Staples, printed record pages 81-2, and Samuel McClure, printed record pages 82-3). About two-thirds of the logs cut on the St. Croix, are rafted and taken to points below on that river, and on the Mississippi River, many of such rafts passing West Newton booms (see same testimony).

It further appeared from the evidence of all these witnesses, and some others that it would be a practical impossibility for any of these logs to get through either Lake St. Croix or Lake Pepin loose, that is, unless they were fastened in rafts and towed through.

It is therefore to be observed, that, the three great sources of log supply for the Mississippi river market, are,

1, The pine lands upon that river and its tributaries above Minneapolis, *all* of which are in the state of Minnesota, and the logs cut from which are always a part of the common mass of property in the state until assorted, scaled and put into rafts and started down the river destined to points out of the state.

2, The pine lands upon the St. Croix river and its tributaries part of which are in Wisconsin, and a part in Minnesota; but all

the logs cut from these lands must, before they can be ass orted, become intermingled in a common mass, and therefore, in order to preserve the evidence of individual ownership, a public scale and record thereof is proper and is in fact made; and,

3, The pine lands upon the Chippewa and its tributaries, *all* in the state of Wisconsin, and the logs cut from which do not become intermingled with any of the common mass of property in Minnesota, and have never, prior to 1889, been brought into Minnesota in an intermingled mass. The present controversy involves this class of logs only.

It is insisted, therefore, that as to this latter class of logs, they are at all times subjects purely of interstate commerce while passing through Minnesota, or being detained therein for the sole purpose of being assorted and delivered to their respective owners, and are not in any sense subject to the action of inspection laws, the object of which, and the subjects upon which they can act; are so clearly defined in,

Bowman v. Ry. Co. supra.

Mills & Clapp

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

LINDSAY PHELPS & COMPANY,
Plaintiff in Error,

vs.

JOHN H. MULLEN AND THE STATE OF MINNESOTA,
Defendants in Error.

MOTION TO ADVANCE CAUSE ON THE CALENDAR.

To the Honorable the Justices of the Supreme Court of the United States:

Now comes the State of Minnesota, one of the defendants in error in the above entitled cause, by its Attorney General, and moves your Honorable Court that the said cause be so advanced upon the calendar of your Honorable Court as to have priority of date of hearing and argument over all civil causes appearing therein, in which neither the United States nor a state is a party thereto.

STATEMENT OF FACTS.

The above entitled cause involves the validity of a law of the State of Minnesota relating to the public inspection, surveying, scaling, marking of logs, lumber and timber, running out of any chartered boom located within any of the lumber districts into which the State of Minnesota has by law been subdivided.

The State of Minnesota comprises seven distinct lumber districts.

(Gen. Stat. of Minnesota, 1894, sec. 2391.)

One of the said districts, which is the one involved in the above entitled cause, embraces the following territory as defined in the terms of the statute:

"The Mississippi River and its tributaries below the outlet of Lake Pepin to the southern line of Wabasha county," and is known and distinguished as the Fourth District.

The Minnesota Boom Company referred to in the pleadings, is and ever since the 16th day of April, 1889, has been, a corporation organized, created and existing, and chartered under and by virtue of the laws of the State of Minnesota. The general nature of the business of said company is and always since its organization has been, the construction, maintenance and use of booms, dams and other structures of any kind necessary or advantageous to the performance of logging and lumbering business upon the Mississippi River or either branch thereof, also upon any side or bank, any slough, bayou, branch or part of said Mississippi River, also covering the gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling of logs, lumber or timber of any kind for itself and for any and all persons having logs, lumber or timber upon the waters of said river, between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also at divers and sundry other places.

Within the limits of the county of Wabasha in the State of Minnesota, and within said 4th district of said state, as the said state is laid off for the purposes of the surveying and measurement of logs, lumber and timber there, and branching out from said Mississippi river, is a large slough about three miles in length and of at least one quarter of a mile in width on an average at ordinary stages of water, commonly called and known as the West Newton Slough.

Said Minnesota Boom Company, under and by virtue of its said charter, duly issued and granted to it by the said state, and under and by virtue of the laws of said state, built and constructed several years ago, and ever since said time has maintained, continued, owned and operated a large number of booms within the limits of said slough for the purpose of collecting, gathering, storing, assorting, brailing, rafting and handling logs, timber and lumber as they should come down the Mississippi

river from points above in the ordinary course of business, being all the booms in said slough contained.

It is provided by a law of the said state that there shall be biennially appointed by the governor, with the advice and consent of the senate, a surveyor general for each of its lumber districts, who shall be a citizen of the district for which he is appointed at the time of his appointment, and who shall hold his office for two years and until his successor is appointed and qualified. (Gen. Stat. Minn., 1894, sec. 2392.)

Under and pursuant to the said law the defendant in error, John H. Mullen, was on the 7th day of April, 1893, duly appointed surveyor general of logs and lumber for the said 4th District of Minnesota, and he thereupon duly qualified and acted as such officer during all the times referred to in the pleadings in the said cause.

It is made the duty of the surveyor general by himself or deputy to survey all logs and timber running out of any chartered booms in his district and at the end of each month when he has surveyed any such logs or timber, to make out and deliver to the owner of such boom or the managing agent thereof, a true and correct scale bill stating the date of such survey, the number of logs, pieces of timber and marks thereon respectively, and the number of feet of each mark so surveyed during the month, and to sign the same, and he is further required to immediately record such bill in the books of his office, and upon being paid his fees for such services, to deliver the original bill to the owner or managing agent of such boom, and all boomage or fees of such boom on any logs or timber are to be collected in accordance with such survey. (Gen. Stat. of Minn., 1894, sec. 2400.)

Such surveyor general is given by law certain fees for surveying or scale-marking, making scale bills and recording the same and posting in the ledger. For the purpose of securing to the officer the payment of such fees, whether the same are for traveling, surveying, making scale bills or recording the same, or for any or all of such services, he is given a lien upon all such logs, timber or lumber surveyed and marked by him for the amount for his services thereon, and may retain such lien by affixing to the scale bill of such logs, timber or lumber before the delivery thereof a true statement of the amount due him thereon, and that he scaled such logs, lumber or timber relying upon such lien, and that he claims a lien thereon for such amount and costs of collection. Thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him

thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days' notice of such scale by posting up five written notices thereof, one in his office and one in each of the four most public places in the town or city where the sale is to be made, and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent on the amount due for taking care of the property, and to the officer making the sale ten per cent on the amount payable to the surveyor general.

(Gen. Stat. of Minn., 1894, sec. 2402.)

The surveyor general is authorized to appoint any number of deputies necessary to transact the business of his district. (Id., sec. 2396.)

During the month of May, 1893, the defendant in error John H. Mullen, scaled and surveyed in the manner providedd by law a large quantity of logs running out of the boom aforesaid, and in all respects complied with the requirements of law regulating the duties of his said office, for which he claimed the fees for such case made and provided by the statute of the said state and sought to enforce the same by the seizure of a certain quantity of logs claimed by the plaintiff in error. Prior to the date set for the sale of the said logs at public auction, as provided by law, the plaintiff in error brought an action in replevin against the defendant in error, John H. Mullen, to recover the possession of the logs so seized by him, and which were at the time of the bringing of such action in his possession, and thereupon acquired possession thereof under the statutes of said state by executing to the said John H. Mullen a bond conditioned that the property should be delivered to him if delivery thereof should be so adjudged.

In order to carry on the duties of his said office as surveyor general of logs in the said district and to properly survey and scale all of the logs running out of the said boom, it was necessary for the surveyor general to employ, and he did employ, a large number of deputies, clerks and agents, and to construct certain buildings, and at an expense of over sixteen thousand dollars, no part of which has he ever been able to recover from the owner of the logs or the proprietor of the said boom.

Therefore, the legislature of the State of Minnesota by an act approved April 26, 1895, and entitled "An act for the relief of John H. Mullen and to appropriate money therefor," enacted a law providing as follows:

"Sec. 1. That the sum of fifteen thousand eight hundred (15,800) dollars be and the same is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the Fourth district of the State of Minnesota; in accordance with the instruction of the governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same to said Mullen, and the state treasurer is hereby directed to pay the same.

Sec. 2. Before said payment is made said Mullen shall assign to the State of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the State of Minnesota shall proceed to collect the same in the name of said Mullen, or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the State of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act.

Any sums collected by the state up to the amount hereby appropriated shall be paid to the state treasurer and placed to the credit of miscellaneous appropriations.

Sec. 3. This act shall take effect and be in force from and after its passage."

Pursuant to the said last named act the said John H. Mullen made an assignment in due form to the State of Minnesota of any and all claims which he then had already performed and expenses and disbursements incurred as such surveyor general, and thereupon he received out of the moneys of the treasury of said state in consideration for the assignment of said claim, the sum of fifteen thousand, eight hundred dollars ($15,800.)

Thereupon the State of Minnesota, through its attorney general, applied to the court in which the action aforesaid was pending to be allowed to be made a party to the said action, which application was duly granted by the court and without objection on the part of the plaintiff in error, and the State thereupon appeared in the said action, and answered to the complaint of the plaintiff therein, and has ever since continued to be a party thereto.

This motion is based upon—

1. Section 949 of the Revised Statutes of the United States, which provides:

"When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

2. Rule 26 of the Supreme Court, subd. 7, which in part provides:

"No other case will be taken up out of the order on the docket or be set down for any particular day except under special and peculiar circumstances to be shown to the court."

STATE A PARTY.

It is not claimed that the execution of the revenue laws of the State of Minnesota is enjoined or stayed in any suit in a court of the United States. It is, however, claimed that the said state is a party to the action within the meaning of said section 949, and that such fact, in connection with the peculiar circumstances disclosed by the pleadings, entitle the said state to an advancement of the said case upon this motion.

SPECIAL AND PECULIAR CIRCUMSTANCES.

The special and peculiar circumstances relied upon grow out of and are necessarily incident to the business of scaling, surveying, and booming logs in the Mississippi river within the said State of Minnesota.

Vast quantities of logs and lumber belonging to divers owners are annually floated down the Mississippi river to various points situated thereon both within and without the said state. The business of logging and lumbering as now and for many years last past carried on within the limits of the State of Minnesota and other adjacent states, has been and is necessarily and will continue to be of such a nature that the ownership of all logs must be and is necessarily indicated by marks and devices cut upon said logs and such other marks and devices as may from time to time be created and devised. Such marks and devices are now and for many years last past have been and will continue

to be commonly used by all persons, firms and corporations engaged in the business of logging and lumbering for the purpose of indicating the ownership of each, and for the purpose, as far as possible, of separating the property of the one owner from that of another, each owner using in all instances marks and devices other and different from those used by any other owner. Notwithstanding the various contrivances suggested by a long experience and an intimate knowledge of the subject, and owing largely to the fact that the business of logging and lumbering has grown so great and covers so much territory and such quantities of timber and logs, and is engaged in by so many different persons, firms and corporations, it is and for many years last past has been, and for many years yet to come will be, impossible to keep the logs of any particular firm, person or corporation separate and distinct from the logs of any other person, firm or corporation when the same are floated upon the waters of the Mississippi river or of any of the streams tributary thereto. In the practical operation of the business of logging and lumbering it has been found that the logs of different owners become intermingled by reason of accidents, storms, carelessness and particularly the efforts of wrongdoers who, for the purpose of depriving the true owners of their property and their rights in and to the same, take advantage of the unique nature of the property, and seek to and do intermingle the said logs belonging to any one person, firm or corporation whose property they seek to take or control with the logs of others. When logs become so intermingled as aforesaid, whether by chance or otherwise, it becomes, is and will continue to be necessary for the various owners thereof, in order to save their respective logs and properly enjoy the use and benefit thereof, to have the same picked out and separated one from another so far as possible, and for that purpose, among others, there has been and is built, constructed, erected and maintained by said Minnesota Boom Company, within the limits of said state of Minnesota and within the limits of said 4th District and in said West Newton Slough, large booms for the assorting and handling of logs, and inasmuch as the said West Newton Slough is particularly well situated for said purpose, it has been taken possession of by said Minnesota Boom Company, and all of the logs which come down said Mississippi river and its tributaries into said 4th District of the State of Minnesota are floated into and through West Newton Slough and into and through said booms built, erected, constructed, operated and maintained by said Boom Company as aforesaid, for

the purpose of assorting, gathering, collecting, storing, brailing, rafting and handling the same.

After said logs are assorted as aforesaid, and while they are in said boom, they are put up from time to time in brails and rafts in order that they may be conveniently handled and taken from place to place upon said river and for the general convenience of the owners thereof in handling, selling and disposing of the same. It is claimed that during the season of 1893 there passed through said boom in said West Newton Slough five hundred million feet of logs, and that said logs were marked by a large number of different marks, which logs are claimed to have been owned by a large number of different persons, firms and corporations.

Logs floating down the said river are passed through said slough and said boom at a very rapid rate and in very great and large numbers and quantities from time to time while the season lasts, which is a necessarily limited period because of the uncertainty of a sufficiency of water in said Mississippi river to permit said logs to run freely.

The State of Minnesota, for the purpose of protecting the people thereof and their rights in and to their property in logs, and for the purpose of preventing fraud, conversion and wrongdoing in respect to the selling, handling, booming, measuring, brailing, rafting, gathering and storing of said logs and the ownership thereof, has passed the wise and salutary laws for the inspection, scaling and surveying of logs, already adverted to in part.

While said logs are passing through said boom in said slough, they are gathered into brails and rafts and thereafter towed and floated down the Mississippi river to be used for commercial purposes, and are oftentimes sold in bulk in the rafts, and in cases of such sales the purchasers as a general rule are obliged to rely for the quantities in such brails and rafts contained upon the scaling, survey and measurement made at said boom at the time said brails and rafts are made up. When logs passing through said boom are scaled, surveyed and measured by parties interested therein it has been found that many errors and mistakes creep in, and it oftentimes occurs that such mistakes are made purposely so that rafts and brails when made up as aforesaid do not correctly and accurately show the quantities of logs actually therein, although they nominally purport so to do. Hence the necessity for inspection and surveying under public supervision.

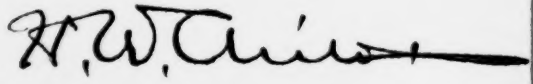
The logs floating down the Mississippi river running through said boom in said West Newton Slough in such large quantities

and with such a diversity of ownership that it has been and is absolutely impossible for the surveyor general of said 4th District to personally perform all the work and duties laid upon him, and it is now necessary, and for many years to come will be necessary, for the surveyor general in the said 4th District to keep a large force of men and deputies in and about his said work in order to carry on the same, and that it is now and will be necessary for him to build a large and expensive camp to care and provide for said men, whereby he will be required to annually expend a very large sum of money.

The proprietors of the said boom and some of the owners of logs and timber boomed and brailed therein deny the right of the state, through its officers and agents, to inspect, survey and measure the said logs and timber, and utterly refuse to pay to such officers and agents any of the fees or compensation provided by law for such inspection, survey and measurement, or for any of the services which they are required to perform in connection with such inspection and survey.

Until the rights and powers of the surveyor general in and for the said district as defined in and prescribed by the statutes of the State of Minnesota involved in the above entitled action, shall have been determined and adjudged therein, the statute, so far as the said district is concerned, will remain a dead letter and wholly inoperative, inasmuch as no citizen of this state will accept the office and undertake to faithfully discharge his duties. Until such judicial determination, no citizen could afford to incur the very large expenses incident to the performance of his duties and await the uncertainties of litigation.

Wherefore, it follows that unless this motion of the said state is now granted, and the date of hearing of this cause is advanced, logs and lumber will be floated down the Mississippi river within the jurisdiction of said state, into and through said boom in defiance of the laws of the said state, although the same may ultimately be sustained by the judgment of your Honorable Court.



Attorney for the Defendants in Error.

Dated:

No. 239.

FILED
MAR 20 1899
JAMES H. McKENNEY,
Clerk.

Brief of Childs for D. C.

SUPREME COURT

OF THE UNITED STATES.

Filed Mar. 20, 1899.

OCTOBER TERM, A. D. 1898.

No. 239.

LINDSAY & PHELPS COMPANY,
Plaintiff-in-error.

vs.

JOHN H. MULLEN AND STATE OF MINNESOTA,
Defendants-in-error.

Brief of Defendants-in-Error.

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Attorneys for the Defendants-in-Error.

McGill-Warner Co., St. Paul, Minn.

SUPREME COURT

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OCTOBER TERM, A. D. 1898.

LINDSAY & PHELPS COMPANY,
Plaintiff-in-Error.

vs.

JOHN H. MULLEN AND STATE OF MINNESOTA,
Defendants-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

STATEMENT.

The State of Minnesota is by law divided into five districts for the survey and measurement of logs and timber therein. Of these, the Fourth district, and the one involved in this litigation, is defined as follows:

"The Mississippi river and its tributaries below the out-let of Lake Pepin to the southern line of Wabasha county."

The defendant-in-error, John H. Mullen, was in the early part of the year 1893 duly appointed surveyor-general of logs and lumber of said district. He at once accepted the said office and entered into the discharge of the duties thereof and continued therein throughout the year 1893.

On the West shore of the Mississippi river a boom had been

constructed some years prior to 1893 by the Minnesota Boom Company, a corporation organized under the laws of the said state. During the year 1893 it was in full operation and boomed the very large amount of 500,000,000 feet of logs (Record, p. 58).

The construction of the boom is clearly stated in the testimony of witnesses (Record, 44), and well illustrated by exhibit (Record blue print).

It will be observed that it is so constructed that all logs floating down the river are sheared or turned into it by means of a shear boom extending from the main works diagonally across the river to the Wisconsin shore.

It is in evidence that the great mass of logs floating from above it are loose and that those of different owners are mingled together when received into it. It is the very object of the boom to assort such logs and to properly brail them for rafting.

In order to properly inspect and survey logs, every one must be seen, its marking noted, its character ascertained, and its contents computed.

The defendant-in-error, Mullen, fully advised as to the importance of his official duties in such regard, appointed a large number of deputies and assistants, erected buildings for their accommodation in proximity to the works (Record p. 37), and thereupon began the work of making an inspection and survey of logs and timber running out of the said boom.

But at the very inception of his duties, he was studiously resisted, hampered and annoyed by the agents and employees of the boom company. It is evident from the Record that it was the purpose of the said company to interpose so many obstacles and to so inspect his official work as to cause him in despair to desist therefrom. He was only able to proceed at all with the work by sueing out an injunction order restraining such interference. (Record, p. 37.) The evidence upon this topic largely appears on pages 46 to 49 of the Record. It

will be seen by reference thereto that these obstructions were extremely exasperating. They began by an attempt to prevent the erection of the buildings. The agent in charge of the boom, one Scott, had given orders to a subordinate to cut the ropes of the barge on which lumber for the camps was being moored. (Record, 46.)

> "A. Mr. Scott was on the bank, and he and I had some talk about what happened a couple of days before that. I said I thought Mr. Douglas acted very roughly with me in cutting the barge loose. He said: 'I gave him orders to cut the barge loose.'
>
> "The Witness: The first obstruction was when we undertook to land the barge; a brail of logs was dropped down against the barge. I undertook to make fast to the pile out in the river. A brail of logs came out, and I told a man with a skiff to get on to the brail and pull; they did so and made fast to the piling in the river. Mr. Douglas ran up to the steamer Hartford and ordered them to let that line go, and they did so. I didn't know anything about it, and called out to them to know what was the matter when I saw the line let go. They came in, and I told them to go and make fast to the shore, and not let go unless I told them to. They started with another line, or the other end of that line on shore, and made fast to a tree in the water. I was snubbing the end of the line on the barge when Mr. Douglas, with his steamboat, ran down between me and the shore and got the line fast on the bow of his boat. I threw the line loose on the barge, and let it drop in the water, so that he ran over it. I turned to pull it in again and heard him call to some man in a skiff to cut the line, and the line was cut square off. I called the men in with the skiff again, and told them to take the other line and go ashore—we were then getting near the shore—and Mr. Douglas, with his steamboat, ran round on the lower side of me and said: 'Get out of here.' I told him this was stuff to build camps for Gen. Mullen, and I would

like him to tow me to where I wanted to go. I told him I wanted to go up there, and he said he would tow me down the river. I told him I didn't want to go down the river; I said I wanted to go up the river. He said, 'Get out of here.' I said, 'I have got some stuff that I am going to land to make camps for Gen. Mullen.' He said, 'If you will put a board on shore I will throw it into the river.' He said, 'Come down to the office.' I started to the hind end of the barge, and when I got very near the hind end of the barge he picked up the line and picked up a pole and pushed the barge out in the river. They let it go adrift, and we had nothing to make a landing with.

"Q. What was the condition of the water?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"A. It was very high; running over the banks of both sides; a very swift current.

"Q. What was next done?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"Mr. Clapp: It seems to me that is immaterial; we do not deny that we used all reasonable means to prevent them landing, believing they were wrong, and were attempting to land on our private property. *We shall not claim that this defendant did not do his duty as far as scaling the logs was concerned.*

"Q. What was then done?

"Objected to as immaterial and incompetent. Objection overruled. Plaintiff excepts.

"The Witness: We drifted down the river a little way when someone ordered a steamboat to go and hitch on to us and take us off the premises. The steamer John Paul came along and coupled on to the barge and started down the river with us. I asked who was the captain of the boat, and Mr. McKenzie said he was the foreman. I asked him where he was going with me; he said he was going to take us to Minneiska. I told him I didn't want to go to Minne-

iska. I wanted him to take me where I could unload and build a camp. He said he had to ob[illegible] orders. They took us down and landed us as far [illegible]wn as Minneiska and tied a line to the shore, and then went off and left us there. This was between five and six miles below the point where we were cut loose, I should judge."

Record p, 47–8.

It was a bold attempt by a powerful corporation to prevent, in defiance of law, the performance of official duty.

The defendant-in-error, Mullen, prosecuted his work faithfully, by the aid of experienced scalers, and at the close of each month, as required by law, made out and delivered to the agent of the boom companies, a scale bill and demanded the payment of the statutory fee prescribed for such services. The payment of such fees was refused, and he thereupon seized, in accordance with statutory authority, the logs which are now the subject of this litigation. Before the time had arrived when the logs could be lawfully sold, the plaintiff-in-error brought an action in replevin in the Circuit Court for the district of Minnesota and thus reacquired possession of the said property.

The legislature of Minnesota, recognizing the great sacrifices which had been made by the defendant-in-error, Mullen, by his efforts in executing the laws by which his office is governed, provided in 1895, (by the act set forth at length on page 25 of the brief of the plaintiff-in-error, for his relief, among other things), for the payment of $15,800 to him on account of disbursements made and expenses incurred by him in such regard. It was further provided that before the payment of the sum so appropriated should be made, the said Mullen should assign to the state any and all claims which he then had for labor performed and expenses and disbursements incurred by him as such Surveyor General.

The assignment was duly made (Original Record, p. 41)

and thereupon the state became a party to the pending suit (Record, p. 21).

In the court below judgment was rendered for the defendant-in-error.

ARGUMENT.

I.

The booms at West Newton Slough are booms chartered by law within the meaning of the statutes of Minnesota authorizing the inspection of logs.

It has long been the settled policy of the state of Minnesota to require all logs and lumber running out of a chartered boom to be surveyed.

The original act upon the subject was enacted by the territory of Minnesota in 1854 and provided for survey by the officer "when requested to so do."

Laws 1854, chap. 16, sec. 10.

But in 1857 the law was amended by omitting the words just quoted.

Laws 1857 (Extra session,) chap. 28, sec. 1.

The policy of the state in such regard has remained unchanged ever since, the present law, being the one under which the survey was made in 1893, reading as follows:

> "Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district, and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and upon

being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor generals, or copies of such records, duly certified, shall, in all courts of this state, be prima facie evidence of the matters stated in such scale bill, record or copy."

Gen. Stat. Minn., 1894, sec. 2400.

The purpose which has actuated the legislature in enacting and continuing in force that provision of statute is readily understood.

Minnesota contains, as this Court is informed by its judicial knowledge, extensive pine forests which are the source of great lumbering interests. The pine areas are in great measure tributary to rivers and streams which have always been utilized to a very large extent for floating logs to mills and markets. As a single stream is commonly employed during the same season by many persons, firms or corporations for the floatings of logs it is unavoidable that the logs of different owners should become intermingled, giving rise to many vexations and, now and then, to downright rascality.

To minimize such evils, two expedients naturally came into vogue, the one, the adoption of log markings, and the other, a public inspection.

For more than forty years the state has unremittingly required such inspection. No charter has been granted, and no incorporation permitted, for the purpose of booming logs in the rivers and streams of that state, since 1857, which was not attended with the condition that those logs should be subject to public inspection.

The Minnesota Boom Company was incorporated under the General Laws of Minnesota in 1889. The purposes for

which it was organized appeared in article 1 of its articles of association, which is as follows:

> "The general nature of the corporate business shall be the construction, maintenance and use of booms, dams, and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi river, or either bank thereof, between the mouth of the Chippewa river, or a point opposite thereto, and the points where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also upon, or any side or bank of, any slough, bayou, branch or part of the Mississippi river between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation, beside the construction, maintenance and operation of said structures, shall be gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling any and all logs, lumber and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber or timber upon any of said waters or within said territory, and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with those logs, lumber or timber, any work or services *are* done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid. The principal place of business of the corporation shall be the city of Winona, Winona county, Minnesota."
>
> *Record, p 107.*

By reference to its articles, it will be perceived that they contain no specification of the particular statute under which the incorporation was intended to be made. The attempt was

evidently made to so incorporate as to be in position to invoke any favorable provisions of statute as circumstances might require.

At the time when the Minnesota Boom Company was organized there were doubtless only two provisions of statute under which an incorporation could legally be effected. One of these is *Gen. Stat. Minnesota, chap. 34, Tit. 1, sec. 1*, which, so far as material, is as follows:

> "Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein."

The other provision is *Gen. Stat. Minnesota, chap. 34, Tit. 2, sec. 1*, which, so far as material, is as follows:

> "Any number of persons, not less than three, who have or shall, by articles of agreement, associate, according to the provisions of this title, under any name assumed by them, for the purpose of engaging in or carrying on the business of mining, * * * or other lawful business."

It is contended by the plaintiff-in-error, page 51 of brief, that at the time when the said company was organized, there was no law which gave it any authority "beyond the mere power to be a corporation," except the said chapter 221. But chapter 221 had not been enacted at the time when the corporation was formed. That chapter was approved and became a law April 24, 1889.

Gen. Laws Minn. 1889, chap. 221.

The company was organized eighteen days before that, namely, April 6, 1889. (*Record p. 109.*)

But counsel have evidently fallen into serious error. The words "or other lawful business," contained in section 1 of title 2, *supra*, have been construed by the Supreme Court of Minnesota, wherein the court say:

> "1. Assuming that defendants were in position to raise these points in this case, we are of opinion that neither of them is well taken. The first point all hinges upon the effect and force to be given to the expression 'or other lawful business,' as used in the statute referred to. Gen. Stat. 1866, chap. 34, sec. 45, as amended by Laws 1873, c. 13. As originally enacted, this statute authorized the formation of corporations for various kinds of business specifically enumerated. To these others were added by an amendment in 1868, and still others in 1869. Finally, in March, 1873, it was again amended so as to include a variety of still other kinds of business specifically enumerated, and then adding the general words 'or other lawful business.' Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated, and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense, in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by *quasi* public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

Brown vs. *Corbin*, 40 Minn. 509.

It is thus seen that the court holds, in short, that the words are a "catch-all" including any other kind of business for a pecuniary profit "not elsewhere provided for." In other words, whatever business a private individual might do, would be lawful for a corporation to do.

The construction given to a statute by those charged with the duty of executing it, will not be overruled without cogent reasons.

United States vs. *Moore*, 95 U. S. 760;
Brown vs. *United States*, 113, U. S. 568.

This rule applies with equal force to the construction given to statutes by the highest courts of the states adopting them.

If there is any business in the pine-forest states of this country which an individual may lawfully do, it is to float or drive his logs to mill or market.

Town of Pierrepont vs. *Loveless*, 72 N. Y. 211.

He may float his logs with the same right that he may transport the products of his farm on a flat boat.

If a stream is naturally of sufficient size to float boats or *mill-logs*, the public have a right to its free use for those two purposes, unincumbered with dams, etc.

Angell on Water Courses (7th Ed.) sec. 537.

Navigation is certainly a lawful business in which any citizen may engage.

The great weight of authority in this country sustains the view that in the timber states especially, where great lumbering interests are carried on, the floating of logs is navigation. Hence streams capable of being so used are called navigable.

Angell on Water Courses, (7th Ed.) sec. 537;
Bouvier, Title, "*Navigable Waters*;"
Morgan vs. *King*, 35 N. Y. at p. 459;
Rhodes vs. *Otis*, 33 Ala. 596;

Moore vs. *Sanborn*, 2 Mich. 519;
Thunder Bay Company vs. *Speechly*, 31 Mich. 342;
Whisler vs. *Wilkinson*, 22 Wis. 549;
Smith & Hambrick vs. *Fonda*, 64 Miss. 551;
Wadsworth vs. *Smith*, 2 Fairchild (Me.) 278;
Brown vs. *Chadbourne*, 31 Me., 9.
Treat vs. *Lord*, 42 Me., 558.
Weise vs. *Smith*, 3 Ore., 445.
Lewis vs. *Coffee County*, 77 Ala. 190.
Olson vs. *Merrill*, 42 Wis., 203.
Cohn vs. *The Wausau Boom Co.*, 47 Wis., 314.

In *Morgan* vs. *King supra*, the Court say:

> "It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance."

In *Whisler* vs. *Wilkinson, supra*, the Court say:

> "The rivers of this state capable of floating the products of the country, such as saw-logs or rafts of lumber, to mill or market, are by the common law public highways by water. * * * It would be exceedingly detrimental to the public interests, especially in the pine growing regions of the state, if this were not so."

In *Smith & Hambrick* vs. *Fonda, supra*, the Court say:

> "When the public may rely upon a stream as a safe and convenient means of transporting on it the logs which are cut from the forest on its banks, it is a navigable stream."

Is it credible that in the State of Minnesota where, throughout its entire history both as a territory and a state, so many of its people have been engaged in the business of lumbering, and where many of its streams have been for many years

almost exclusively devoted to the floating of logs, the booming, floating or driving of logs is not a lawful business?

It would seem to be too clear for controversy that the said company could lawfully incorporate under the said title, for all or any of the purposes stated in its articles.

But there is seemingly much force to the view that the corporation may be deemed as organized under said title 1. Conceding for the purposes of the argument only, that the statute was not sufficiently ample at the time when the company was formed to permit its incorporation thereunder, it would now be too late to call into question the validity thereof.

An incorporation attempted only eighteen days prior to the date of the amendment, the amendment completely covering the subject, the state having suffered the incorporation to go unchallenged for a period of two years, it may be presumed that the courts would now recognize the incorporation as valid.

The statute confirms the powers enumerated in the charter.

Stevens Point Boom Co. vs. *Reilly*, 44 Wis., 302.

But section 3 of said chapter 221 expressly provides that it shall apply to corporations previously organized.

But the plaitiff-in-error is estopped to deny the corporate powers of the company.

It is evident from the record that the plaintiff-in-error is one of the parties interested in the operation of the booms at West Newton Slough. (Brief of plaintiff-in-error, p. 9.) It is immaterial, so far as the enforcement of the inspection laws of Minnesota is concerned, whether the boom was in fact operated by the Minnesota Boom Company organized under the laws of this state, or by the Mississippi River Logging Company, or any other company organized as a corporation under the laws of the state of Wisconsin. It is enough to know that it was in fact operated by a *chartered company*. The trial court was evidently satisfied that the evidence warranted the

finding that the Minnesota Boom Company was in charge of it in 1893.

But the allegations of the reply filed by the plaintiff-in-error should not be overlooked. It is there alleged that many of the mill owners residing on the banks of the Mississippi river organized the Mississippi River Logging Company and that the last named company organized the Minnesota Boom Company. (Record 13.) The Mississippi Logging Company also organized the Chippewa Logging Company. (Record 14.)

Frederick Weyerhauser was president of the last named company in 1893, (Record 94), and Thomas Irvine was its secretary. (Record 51.)

The witness, John H. Mullen, testified that he had a conversation with the said Irvine while he was engaged in scaling the logs at the said boom. They were also president and secretary respectively of the Mississippi River Logging Company. (Record 61.)

Q. You may state what he said as to who was in charge of the Minnesota Boom Company.

A. He said Mr. Scott was George Scott. (Record 51.) Mr. Scott, it will be remembered was in charge of the boom. (Record 53, 46.) It was Scott who said that he gave Douglas the orders to cut the line. (Record 46.) The record discloses the existence of a large number of companies engaged in the lumbering business on the Mississippi and its tributaries, all correlated and constituting under the name of the Chippewa Logging Company what the plaintiff-in-error styles in the filed in its behalf "the pool," and the record bears him out. (Record 67.) Out of this combination, and for effectuating the common purpose of booming logs, sprang the Minnesota Boom Company. It was begotten by them and has always been dependent upon them. It is sheer fiction to say that it was not in 1893 fulfilling the purposes of its corporate being. The reply expressly alleges that there the boom at West Newton slough was carried on by the Mississippi Logging Com-

pany in the name of the Minnesota Boom Company. (Record 14.)

It is therefore just to maintain that the doctrine of estoppel applies.

Keeping in mind the policy of the law as to the inspection of logs, we submit that the word charter, as used in the statutes of Minnesota, should not receive a narrow construction; but that such construction should conform to the manifest policy of the state as evinced by the statutes above cited.

It is true that during territorial days, charters were granted by the legislature to certain boom companies; but it would be most detrimental to the public interest, and at variance with the common understanding of the people of that state, to restrict the term "chartered" as employed in said section 2400, to these companies.

We take it to be the settled rule of the courts of this country that where a corporation is organized under a general law, that law is its charter.

> *Thomas* vs. *Railroad Co.*, 101 U. S., 71.
>
> *Oregon Railway Co.* vs. *Oregonian Ry. Co.*, 130 U. S., 1.

> "The general statute, when aroused into specific operation by a compliance with its terms on the part of an association of persons and capital, unites itself with the terms and details of such a compliance; the law and the articles of association become, as it were, the compact between the state and the association, and this constitutes the charter of the body politic."

> *O'Brien* vs. *Cummings*, 13 Mo., App. 197.
>
> *Granger's Life & H. Ins. Co.* vs. *Kamper*, 73 Ala., 340.
>
> *Smith* vs. *Sherry*, 50 Wis., 214.

The articles of association of a company thus organized, taken in connection with the laws under which the organiza-

tion takes place, form the constitution of the association, and answer the same purposes as a special charter.

1 Morawitz Pri. Corp., sec. 318.

Where a company organized under the laws of Minnesota has constructed booms reaching from shore to shore in an interstate stream, forming the boundary between two states, it cannot with commendable grace assert that its acts are *ultra vires* as a defense to an action for the fees which are required to be paid by a chartered company.

The statute will be deemed confirmatory.

> "What the statute authorized to be done after its passage it legalized from thenceforth, as against the state, when done before. It is sufficient here that the respondent's works, as far as authorized by the statute, and so far as the state had power to authorize them, had become legal before the commencement of this suit."

Stevens Point Boom Co. vs. *Reilly*, 44 Wis. 302.

The question involved in *Black River Flooding-Dam Associatinn* vs. *Ketchum*, 54 Wis. 313, cited by the plaintiff-in-error, is not in this suit. There the question was whether the plaintiff was entitled to collect tolls, for logs which had been driven in a certain river. It was not contended that the plaintiff had driven them or performed any service with respect to them; but the right to collect the tolls was based wholly upon the fact that the plaintiff had improved the river.

The Court held that the statute applied only to corporations which had taken prior possession of the river, and, inasmuch as the plaintiff had not done so, it was not entitled to the tolls.

If the Wisconsin Court had been determining rights under a statute like said chapter 221 its decision must have been just

the opposite of the one reached, for the reason that section 2 thereof is as follows:

> "The provisions of this act shall apply as well to corporations *heretofore* organized for the purposes specified in section two (2) of this act, as to those hereafter organized for such purpose."

The right of a corporation to collect tolls upon a public highway must certainly rest upon express statutory authority.

The moment it is conceded, and there would seem to be no escape from the concession, that it was lawful under the lawful business clause of said title 2, to construct booms in the streams of Minnesota, it at once follows that it was lawful to construct the boom in question at West Newton Slough. The only distinction to be drawn between the Mississippi river and other navigable streams is that where it forms the boundary between the two states, those states have concurrent jurisdiction over it. The question of concurrent jurisdiction over such waters is exhaustively considered by the Supreme Court of Wisconsin in the case of

> *J. S. Keator Lumber Co.* vs. *The St. Croix Boom Co.*, 72 Wis. 62,

in which it is said at page 96:

> "The words 'concurrent jurisdiction' must have been used in the compact between the Federal government, Wisconsin and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact it was in effect provided that such state shall have 'concurrent jurisdiction' on that portion of the river St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the

river by the other state. In other words, *by such compact each state secured to itself such 'concurrent jurisdiction' upon the half of the river within the territorial limits of the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own behalf to mere 'concurrent jurisdiction.'*"

It is not necessary to have legislative authority as a prerequisite to the right of constructing a boom in a navigable stream.

Cohn vs. *The Wausau Boom Co.*, 47 Wis. 314;
Canfield vs. *Brig "City of Erie,"* 27 Mich. 479.
Stevens Point Boom Co. vs. *Reilly*, 44 Wis. 295.
McPheters vs. *Moose River Log Co.*, 78 Me. 329.

In *Canfield* vs. *Brig City of Erie*, supra, Judge Cooley says:

> "It it clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season, where in fact the principal industry consists in cutting, floating and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation, the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place upon the market. It is just and reasonable, therefore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for boom-

> ing facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream. The question whether a nuisance or not, is complicated; it must depend in any case upon the particular facts, and the necessities and conveniences of each interest must be considered and compared before the proper conclusion can be reached."

It is respectfully submitted that the said chapter 221 does not admit of the construction placed upon it by the plaintiff-in-error (Brief 55), in effect, that it does not authorize a company to maintain assorting booms. The very first words of section two are: "Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein." Could language be broader? They may drive, *hold* or *handle* logs. Certain restrictions are provided, among which we note, that navigation of the stream is not to be materially impeded.

Equally fallacious is the contention that said section 2400 does not apply to a company organized under said chapter 221 for the assigned reason that the company is not vested with power to boom all logs floating in the river. It is enough to warrant the application of section 2400 that the company may take possession of "all logs, put into such streams or upon roll ways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such streams without hindering the main drive." Here is authority to take such forcible possession and against the wishes of owners of such logs. Can any stronger reason be desired why the public officer should supervise? Is it reasonable to assume that the legislature intended to except such companies when it enacted the law of 1889?

In refutation of the suggestion that it might not be lawful for the state to confer power to construct a boom at West Newton Slough under the commerce clause of the constitution, we deem the question determined and settled.

Packet Co. vs. *Keokuk*, 95 U. S. 80;
Packet Co. vs. *St. Louis*, 100 U. S. 423;
Vicksburg vs. *Tobin*, 100 U. S. 430;
Packet Co. vs. *Catlettsburg*, 105 U. S. 559;
Transportation Co. vs. *Parkersburg*, 107 U. S. 698;

II.

The statute of Minnesota prescribing the fees of the surveyor general contemplates the seizure of any logs in payment thereof, irrespective of ownership.

It may be observed at this time that the objection to the statute of Minnesota made by the plaintiff-in-error in the second subdivision of its brief is without force, in view of the facts of this case. The plaintiff-in-error, for all intents and purposes, is the owner of the boom. This fact is developed under the first subdivision of this brief. (Ante.)

The said section 2400 contains no words of limitation or exception. The language is:

> "Every surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district."

The specious argument advanced by the plaintiff-in-error eliminates the question of public policy and proceeds from premises wholly at variance with that policy and not warranted by a fair reading of the provisions of the statute relied on.

This paramount purpose evinced by sections 2400 and 2402 was the provision for a disinterested and impartial sur-

vey of all logs running out of chartered booms. It recognizes the magnitude of the lumbering interests of the state, the constant temptation to override individual rights, and the frauds and abuses which characterize the business when left without public supervision. The record at bar presents a suggestive object lesson. If a public official, in an earnest effort to discharge his duty, could be boldly threatened and embarrassed by a boom company with impunity, the private owner of a small quantity of logs lost in a mass of many millions, would have little hope of securing proper redress. For his protection, the state has seen fit to intervene with its inspection force. It has done in such regard, no more and no less than it has done in providing for the inspection of grain and other commodities, and in the exercise of other supervisory powers.

In support of this view, the language of the Supreme Court of Minnesota is pertinent:

> "Now it appears that there is a large number of persons * * * owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stoped before passing Knife River Falls; the interest of the former, that their logs should be allowed to run over them without interruption. In this conflict, who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the legislature—that department of government which, in the exercises of a law-making and a police power, prescribes the rules by which the use of public highways in general is regulated (*Pound* vs *Turck*, 95 U. S. 459; *Watts* vs. *Tittabawassee Boom Co.* 52 Mich. 203), and save as controlled by paramount law—that is to say, in this instance, by our state constitution or enabling act,

> the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromises of conflicting interests—the best attainable good of all concerned. *Pound* vs. *Turck*, supra; *Duluth Lumber Co.* vs. *St. Louis Boom Co.*, 17 Fed. Rep. 419. In the exercises of its legislative discretion, it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be, as booms, dams, piers, sluice ways, and what use may be made of them, and, in general, in what manner the business shall be conducted. * * * * * On the whole, this is an improvement of the river for the the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation."

Osborne vs. *Knife Falls Boom Corp.*, 32 Minn., 412.

As stated by the Court in *Hospes* vs. *O'Brien*, 24 Fed., 147.

> "The state derives no revenue from the measurement and scaling of logs, and the only object of the law is to ascertain whether the logs are fit for commerce, and to protect the citizens and market from fraud."

Such companies are *quasi* public corporations.

Osborne vs. *Knife Falls B. Co. supra;*
West Branch Boom Co. vs. *Penn. Joint Lumber Co.*, 121 Pa. St., 158.
Cohn vs. *Wausau Boom Co.*, 47 Wis., 314.

That the enforcement of the lien may result in distraining logs not owned by the boom company, presents no valid objection to the law. It was the duty of the boom company to

pay the inspection fee. It owed that duty to every owner whose logs came into its possession and could undoubtedly recover from the owner the amount so expended. It had authority to retain the logs and enforce its statutory lien for dues and lawful advances. Its booms were so constructed as to permit the holding of sufficient logs to protect itself. Failing to do this and thus suffering a seizure and sale of the logs, it at once became liable to the owner in damages.

To hold that the officer must segregate the logs of different owners for the purpose of enforcing his lien, would at once nullify the law. Such a course would be utterly impracticable. Logs can only be inspected while in the pockets preparatory to being brailed. They cannot then be separated. They must go out from the brailing pocket into the stream below. But they always go out in brails. Moreover, the demand for fees can only be made when the scale bill is made out at the end of each month. When the bill is made out the great mass of the logs inspected have been towed down the river by steam boats —in the case of West Newton Slough—and may be beyond the boundary of the state.

The case of *Appleman* vs *Myr*, 74 Mich. 356, is easily distinguishable. There the defendant, a contractor, had contracted with different parties to drive their logs. He had contracted with some of them to also cut and bank their logs. He employed the plaintiff to cut, bank and drive logs. Plaintiff claimed a lien upon a quantity of logs, irrespective of ownership, for labor performed in driving the whole mass. *Held*, he could not in such a case hold the logs of one for the labor performed for another.

In the case at bar, a statute is involved which is notice to all who allow their logs to float unbrailed down the river and into the boom. They enjoy the benefits of the statute burdened with the liabilities it imposes. They know before their logs are rolled into the stream that if they enjoy the benefits of the boom their logs become liable for the inspection fees due

from its owner or proprietor. No contract relationship arises between the officer and the owner of the logs. He takes no note of ownership. He scales the mass of logs issuing from the boom. He is in the employ of no one save the state.

The logs are placed in his district pursuant, in part, to the will of the plaintiff-in-error, in an almost inextricable mass.

They are in the possession of the boom company, which alone is authorized to separate the diverse ownerships therein, place them in various "pockets" of the company, brail and retain them until the charges of the boom company, as well as the expenses of the state inspection are paid.

The exigencies of commerce require these logs to be so checked in their pilgrimage.

Under the authority conferred by the state of Minnesota, the boom company is privileged to act and charge for its services without regard to the request or desire of the owners. Can it not be urged with force, that where these logs are physically within the state of Minnesota, and the exigencies of commerce require not only the inspection and registration of the various ownerships, but the separation and marshalling of this mass of property—that they must be treated for all purposes as *temporarily* the property of the boom company, which has exclusive jurisdiction over them?

And does it not follow that for the purpose of collecting the charges of the surveyor general of the state therein the logs should be treated as a continuing mass in the same condition in which the surveyor general found them? If so, it follows the surveyor general in case of non-payment of his statutory fees of five cents per thousand feet is entitled to retain any part of this mass of logs to secure such payment, and until the boom company which has sole and continuing control of the logs and represents by implication all owners, pays such charges.

III.

The fees of the surveyor general become due and payable at the end of the month and before the scale bill is recorded.

So far as material, the statutes provide:

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, *and at the end of each month when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof a true and correct scale bill,* stating the date of such survey, the number of logs and piece of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, as the record thereof in the respective offices of such surveyor generals, or copies of such records, duly certified, shall, in all courts of this state, be *prima facie* evidence of the matters stated in such scale bill, record or copy."

General Statutes 1894, sec. 2400;

"The fees of surveyor generals shall be: for surveying, scale-marking, making scale-bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for traveling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log-

mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale-bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale-bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index of the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for traveling, surveying, making scale-bills, or recording the same, or for any or all of such services such surveyor-general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon and may retain such lien by affixing to the scale-bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale-bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent. on the amount due, for taking care of the property and, to the officer making

the sale, ten per cent. on the amount payable to the surveyor general."

General Statutes 1894, section 2402.

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages, and orders, and other instruments in writing for the sale, transfer, incumbrance or delivery of any logs or timber in the same district.

"Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general, and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and affect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and

authorized to be kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded and shall, in all courts and places in this state, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all the courts of this state, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated."

General Statutes, section 2403.

It is thus clearly obvious from section 2400 that the recording is not a necessary prerequisite. It was the official's duty to deliver a scale bill to the owner and agent at the end of the month. Two scale bills are plainly intended, namely, the one an original, and the other, a copy. The latter is served at the end of the month, and before payment of the fees. The original is retained to be recorded in the books of his office. When so recorded, the owner is entitled to a delivery thereof upon payment of the amount of inspection fees due the officer. The original and not the copy, when delivered, is made *prima facie* evidence.

It does not lie in the mouth of the boom-owner who has refused to pay the fees that the original has not been recorded. By a payment of such fees he would have secured possession of the original bill itself which would be even better evidence than the record thereof; for, in such a case, the record could not be of higher evidence than the original from which it was made.

The statute expressly provides that "the records shall be of as high degree of evidence as the original instruments

therein recorded." That is to say, all are only *prima facie* evidence.

Plaintiff-in-error questions the authority of the legislature to make scale bills evidence. Such authority would seem to be undoubted.

Campbell vs. *LaClede Gas Co.*, 119 U. S. 446.
Philadelphia, etc., R. R. Co. vs. *Stimpson*, 14 Pet. 448.
Owings vs. *Speed*, 5 Wheat. 420.
United States vs. *Gaussen*, 19 Wall. 198.
United States vs. *Bell*, 111 U. S. 477.
Callanan vs. *Hurley*, 93 U. S. 387.
City of St. Joseph, vs. *Farrell*, 106 Mo. 437.

The whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies, as in its judgment will most completely subserve the ends of justice.

Cooley Const. Lim. (6th Ed.), 451.
Himmelman vs. *Carpenter*, 47 Cal. 42.
Delaplaine vs. *Cook*, 7 Wis. 43.

We do not contend that it was not the duty of the surveyor general to record the scale bills. Our contention is that it was not necessary that he do so as a prerequisite to his right to his fees. We confidently maintain that the construction we have placed upon the statute comports with its spirit and intent.

If this view prevails, it is then obvious that the trial court did not err in excluding evidence bearing on the question of the character of the record nor was it material whether any record at all was made.

The omission to make the record would at worst be an

irregularity and so would not affect the legal force of the scale bill.

Fish vs. *Emerson*, 44 N. Y. 376;
Gunn vs. *Plant*, 94 U. S. 664;
Hopper vs. *Lucas*, 86 Ind. 50.

In *Fish* vs. *Emerson*, *supra*, the court say:

> "The duty of entering it (a judgment of a justice of the peace) in his docket has been held to be directory merely, owing to its ministerial character, and although the time is prescribed by the statute to be four days, within which it is to be done, that is not a limitation upon the power of the justice, but it may be validly prepared long afterwards. * * * * It is also well settled by the authorities cited that the subsequent entry of the judgment in the docket of the justice is valid, although done long after its rendition."

Much stress is placed by plaintiff-in-error upon the ruling of the trial court excluding evidence offered for the purpose of impeaching the scale bills. (Defendants exhibits, 3 and 4.) But the ruling was unavoidable in view of the character of the evidence offered. A few explanatory words will suffice to show the correctness of the ruling.

The defendant-in-error had introduced scale bills showing the marks to which logs had been scaled. The plaintiff-in-error then produced a witness (Record 98), a clerk in the office of the boom company, by whom it was sought to show that he had never seen any of the marks appearing upon exhibit F which had been selected from the scale bills, and that he had never seen logs coming into the boom bearing such marks. Plaintiff-in-error offered to follow up the proposed testimony by other like evidence to the effect that they were marks that nobody knew or ever saw; that the scalers had never found them; that it wouldn't be possible for the quantity of logs purporting to have been scaled daily to such marks to run through the booms on the respective days.

The evidence was excluded for the reason that it was negative, immaterial, and the witness incompetent to testify. It was a wholesale offer at best, a blending of competent and incompetent matter, not followed up by the production of any other witness by whom the proofs were sought to be made, but made undoubtedly in good faith.

As the case stood at the time the ruling was made, the witness was clearly incompetent.

In *Pollard and Picket* vs. *Dwight*, 4 Cranch. 421, it was attempted to prove that a certain survey could not have been made by offering to produce two other surveys made by the same person for another party only two days after the completion of the survey relied upon by the opposing party. The Court say:

> "The surveys * * * were introduced for the purpose of showing that the patent for the lands sold * * * was void, because it issued on a plat representing a survey which, in point of fact, could not have been made. * * * The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the Court, and with which the parties to this controversy had no connection."

Conceding, for the purposes of the argument only, that inaccuracies had crept into the scale bill, the seizure could not be defeated for such reason. The offer was made to prove that out of the 500,000,000 feet of logs scaled something like a million feet appeared upon the scale bills with marks unknown to employes of the boom, and that they were not in fact in the brails to which they had been accredited. Granting this to be true, it amounted only to an error of *one* foot in *five hundred*. The fees of the officer, even if they could have been reduced by force of such evidence, would suffer a diminution of not to exceed fifty dollars.

The court ruled upon *such an offer* and held the evidence immaterial.

Some point is attempted to be made of the fact that a seizure was made before the June scale bill had been made out.

The evidence is that the May bill had not been paid. The seizure of logs for the June bill was made two or three days before the end of the month. The officer was dealing with a company which was bent on resisting the enforcement of his lien. The case fully warranted his action. No injustice was done. He scaled the logs and delivered the scale bill to the agent of the company.

Keeping in mind that the plaintiff-in-error was, for all intents and purposes, the boom company, and it had refused to pay the fees, it cannot now with any degree of justice claim that the officer did not strictly comply with the statute in the performance of his duty. There is a presumption, in the absence of evidence upon the subject, that the survey had been completed and that the seizure was necessary when made in order to enforce the officer's lien. A case is readily imagined when, at the end of the month, when the scale bills were to be delivered, the boom would be empty.

IV.

The statute of Minnesota is a legitimate police regulation and not a regulation of interstate commerce. In short, it is an inspection law.

Cooley on Const. Lim. 6th Ed. 595.
Turner vs. *Md.*, 107 U. S. 38.
Hospes vs. *O'Brien*, 24 Fed. Rep. 145.
Minnesota vs. *Barber*, 136 U. S. 328.
Swift vs. *Sutphin*, 39 Fed. Rep. 630.
Cooley vs. *Board of Wardens*, 12 How. 299.

Owners of James Gray vs. *Owners of the John Frazer*, 21 How. 184.

Benedict vs. *Vanderbilt*, 1 Robertson, 194.

Steamship Co. vs. *Joliff*, 2 Wall. 450.

Wilson vs. *McNamee*, 102 U. S. 572.

Gilman vs. *Philadelphia*, 3 Wall. 713.

Patterson vs. *Ky.*, 97 U. S. 501.

Tiedman on Pol. Power, 207.

Walling vs. *Michigan*, 116 U. S. 446.

Pittsburg, etc., Coal Co. vs. *Louisiana*, 156 U. S. 590.

Sherlock vs. *Alling*, 93 U. S. 99.

Wiggins Ferry Co. vs. *East St. Louis*, 107 U. S. 365.

People vs. *Compagnie*, 107 U. S. 62.

Huse vs. *Glover*, 119 U. S. 547.

Packet Co. vs. *Keokuk*, 95 U. S. 84.

Transportation Co. vs. *Parkersburg*, 107 U. S. 691.

Sands vs. *Manistee River Imp. Co.*, 123 U. S. 288.

Palmer vs. *Commrs.*, 3 McLean, 226.

Kellogg vs. *Union Co.*, 12 Conn. 26.

Gibbons vs. *Ogden*, 9 Wheat. 203.

Gloucester Ferry Co. vs. *Penn.*, 114 U. S. 196.

Eddson vs. *Minnesota*, 166 *U. S.*, 427.

"The right to pass inspection laws and to levy duties so far as may be necessary to render them effectual, is also undoubted, and is expressly recognized by the Constitution. But certain powers which still more directly effect commerce may sometimes be exercised when the purpose is not to interfere with congressional legislation, but merely to regulate the times and manner of transacting business with a view to facilitate trade, secure order and prevent confusion."

Cooley on Const. Lim., (6th Ed.,) 721.

Inspection laws fall within the police powers of the state.

"The police of a state, in a comprehensive sense,

> embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."
>
> *Id. 704.*

> "If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."
>
> *Id. 707.*

If the business in question contains an element of danger to the public, it may be subjected to regulations designed to protect the public against injury; it may be made subject to inspection, and a license fee may be exacted in aid of its inspection laws.

Tiedman on Pol. Power, Sec. 202.

In *Huse vs. Glover,* 119 U. S. 547, was considered the validity of a law authorizing the collection of tolls for the passage of vessels through locks which had been constructed in the Illinois river pursuant to such law, and this Court say:

> "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any

tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the state may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The state is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of inter-state and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the state, greater benefit would result to her commerce by the improvements made, than by leaving the river in its natural state—and on that point the state must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway, or the improvement of an old one, the building of a railroad and many other works, in which the public is interested, may materially diminish business in certain quarters and increase it in others; yet, for the loss resulting, the sufferers have no legal ground for complaint. How the highways of a state, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned. Spooner vs. McConnell, 1 McLean, 337; Kellogg vs. Union Co., 12, Conn. 7; Thames Bank vs. Lovell, 18 Conn. 500; S. C. 46 Am. Dec. 332; McReynolds vs. Smallhouse, 8 Bush, 447."

An act of the legislature of Iowa creating the City of Keokuk gave to the city council power to establish and regulate wharves, and to fix the rates of landing and wharfage of all boats, rafts and water crafts moored at or landing at the wharves. An ordinance was passed by the city providing that certain ground extending to the middle channel of the Mississippi river should be declared a wharf and be subject to be used for such purpose under such conditions as might be prescribed by ordinance. Wharfage fees were provided graduated according to the tonnage of the craft using the wharf. The collection of the fees was resisted by the plaintiff-in-error merely upon the ground that the ordinance was invalid because it sought to impose a duty on tonnage and was a regulation of commerce such as Congress only is authorized to make.

In *Packet Co.* vs. *Keokuk*, 95 U. S. 84, the Court say:

"The principal question presented by the record of this case is, whether a municipal corporation of a state, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

"The city of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. * * * * * *

"To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing

from it, imposed, as it is, by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. *But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation.* The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to clalms for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a state, a municipal corporation, or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not at the choice of the master or owner. No one would claim that a demand of compensation for the use of a drydock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or a state, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the state or a municipal corporation ever since the adoption of the Constitution. * * *

"For these reasons, we hold that the ordinance cannot be considered as imposing a duty of tonnage,

> and what we have said is sufficient to show that most of the other objections of the plaintiffs-in-error to its validity have no substantial foundation. It is in no sense a regulation of commerce between the states, nor does it impose duties upon vessels bound to or from one state to another, nor compel entry or clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of Congress respecting the enrollment and license of vessels for the coasting trade. All these objections rest on the mistaken assumption that port charges, and especially wharfages, are taxes, duties, and restraints of commerce."

So in the case at bar, the law of Minnesota in providing for the boomage and inspection of logs, a service is rendered to commerce and to every person who employs the boom. From the very nature of the logging business, the citizens of Minnesota who are compelled to float their logs along this natural highway are entitled to such a police regulation. No argument is necessary to demonstrate the wisdom of the regulation. The commingling of logs either through unavoidable accident or fraudulent design, must necessarily be attended with great loss to certain owners if provision be not made by the public for an impartial supervision by public officers at some convenient place. What more practicable arrangement can be provided than inspection at the booms into which the great mass of logs are gathered?

The case of *Transportation Co. vs. Parkersburg*, 107 U. S. 691, also involved the validity of a city ordinance exacting wharfage fees. The general subject of the powers of state to legislate in local matters in there discussed, and the Court say:

> "The power of the states to legislate in matters of a local character, where Congress has not by its own action covered the subject, is quite fully discussed by Mr. Justice Field in delivering the opinion of this Court

in Mobile Co. vs. Kimball, 102 U. S. 691, where the distinction taken in Cooley vs. Board of Wardens, between those subjects which are national in their character and require uniformity of regulation, and those which are local and peculiar to particular places, is commented upon and enforced. Amongst other things, it is there said: 'Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act they may be regulated by state authority.' See also the remarks of the Chief Justice in *Hall* vs. *DeCuir*, 95 U. S. 485. * * * *

"In the various bridge cases that have come before the Courts of the United States, where bridges (or dams) have been erected by state authority across navigable streams, the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress, and the power of the states over the subject in the absence of such legislation. Where the regulation of such streams by Congress has been only of a general character, such as the establishment of ports and collection districts thereon, it has been held that the erection of bridges, furnished with convenient draws, so as not materially to interfere with navigation, is within the power of the states, and not repugnant to such general regulation. The former cases on this subject are reviewed in

Trans. Company vs. *Chicago, ante*, p. 678.

"It is believed that no case can be found in which

> state laws, or regulation under state authority, on subjects of a local nature have been set aside on the ground of repugnance to the power of regulating commerce given to Congress, unless it has appeared that they were contrary to some express provision of the Constitution, or to some act of Congress, or that they amounted to an assumption of power exclusively conferred upon Congress."

It will not be contended surely that Congress has anywhere undertaken to legislate upon the subject in question.

A statute of Michigan authorized improvements to be made in the Manistee river by a certain company, consisting in the removal of obstacles to the floating of logs and lumber down the stream. Tolls were authorized to be fixed at proper rates for running vessels, boats, rafts, timber, logs or lumber through the improved stream. The river was wholly in the State of Michigan. An action was brought to collect tolls for several years, and was resisted on the ground that the imposition of the toll was the taking of property without due process of law. To this contention it was said in *Sands* vs. *Manistee River Imp. Co.*, 123 U. S. 288:

> "The plaintiff-in-error, the defendant below, misapprehends the purport of the provision that no state shall deprive one of property without due process of law, when he considers the exaction of tolls under a statute for the use of an improved waterway as a deprivation of property within its meaning. There is no taking of property from him by such exaction within the prohibition, any more than there is a taking of property from a traveler, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated.
>
> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of high-

ways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property; or of the improvements and considerations of the return which such values or expenditures should yield. The legislature, acting upon information received, may prescribe at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascertain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the legislature. In the administration of government, matters of detail are usually placed under the direction of officials. The execution of general directions of the law is left, in a great degree, to their judgment and fidelity. Any other course would be attended with infinite embarrassment.

"In authorizing the Board of Control to fix rates of toll for the floating of logs and timber over the improved portions of the Manistee river, certain limits are prescribed to its action; but within those limits the matter is left to its judgment. No notice can be given to parties, who may have occasion to use the stream, to attend before the board and present their views upon the tolls to be charged. Such parties cannot be known in advance. The occasion for using the improved stream may arise at any time in the year; perhaps after the tolls have been established. The whole subject is one of administrative regulation, in which a certain amount of discretionary authority is necessarily confided to officers entrusted with its execution. Should there be any gross injustice in the rate of tolls fixed, it

would not, in our system of government, remain long uncorrected.

"The Manistee River is wholly within the limits of Michigan. The state, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state — that is, the commerce which is wholly confined within its limits — is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in County of Mobile vs Kimball, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* vs. *Glover*, 119 U. S. 543,548. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the state."

The mere fact that a slight delay may attend the inspection of the logs, does not present a case of a violation of the commerce clause of the constitution.

The compact in the ordinance of 1787 creating the state of Ohio provided that "the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways and forever free * * * without any tax, impost or duty therefor." An application was made for an injunction to prevent the construction of a drawbridge over the Cuyahoga river on the ground that it would obstruct the navigation of the river. The court in *Palmer* vs. *Commrs*, *3* McLean, 226, said:

"A toll charged for the improvement of the navigation of a river, is not within the ordinance. In such a case the tax would not be for the use of the river in its natural state, but for the increased commercial facilities. A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the state to make the bridge. It is one of those general powers possessed by a state for the public convenience, and may be exercised, provided it does not infringe on the federal powers, or violate the limitations in the ordinance."

A statute of Connecticut authorized a company to improve the Connecticut river so as to be navigable for vessels and to collect tolls from vessels drawing more than six feet of water.

To the contention that the law was in violation of the commerce clause of the Federal Constitution the Supreme Court of Connecticut in *Kellogg* vs. *The Union Company*, 12 Conn. 26, say:

"It is very obvious that the act was not intended to impose, nor does it impose, any tolls upon vessels which, in ordinary seasons, might have passed up and down the river in its unimproved state. Congress has made Hartford a port of delivery. The effect of this charter is, to make that port accessible to vessels, to which it was not before accessible; and upon these, and upon these only, a toll is imposed. Does such a charter conflict with the law of Congress? Is it not rather in furtherance of the law? Suppose Enfield were to be made a port of entry; would the canal around the falls cease to be the property of the company by whom it has been constructed, under a charter from the state?

> The principle contended for most palpably denies to the states all power of improving their navigable waters. Such power certainly did exist in the states, before the delegation of power to the general government by the federal constitution. Is this among the delegated powers? And is it so delegated as that it ceases to exist in the states? That there is any such express delegation, is not pretended. If such delegation is to be found in the Constitution it is, confessedly in that clause of it, so often adverted to, which empowers Congress to regulate commerce with foreign powers and among the states. And that such power was not intended nor understood to be delegated by that clause in the Constitution, we have already said, is very manifest from the whole current of state legislation on this subject; and from the acquiesence of the general government, as well as upon the authority of decided cases.
>
> "Upon the whole we are of opinion that there is no foundation for the several objections urged against a recovery in this case; and that the plaintiffs are entitled to retain their verdict."

State inspection laws, health laws, and laws for regulating the internal commerce of a state, and those respecting turnpike roads, ferries, etc., are not within the power granted to Congress. This was clearly stated by Chief Justice Marshall in *Gibbons* vs. *Ogden*, 9 Wheat. p. 203.

> "But, the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution, as being passed in the exercise of a power remaining with the states.
>
> "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be for domestic use. They act upon the subject before it be-

comes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass." (p. 203.)

"Inspection laws are of a more equivocal nature, and it is obvious, that the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favor of the power of the states over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious, that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. * * * *

"It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of—that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the states, and to aid in enforcing their health laws; that which surrenders to the states the superintendence of pilotage, and the many laws passed to permit a tonnage duty to be levied for the

> use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers." (p. 235-8.)

In *Turner* vs. *Maryland*, 107 U. S., 38, was involved the validity of a certain statute of Maryland relating to the inspection of tobacco.

A synopsis of the statute begins on page 41.

Essential part of decision begins on page 48.

The opinion refers to a valuable note at foot of page 51 showing inspection laws adopted by the several colonies prior to and in force at the time of the adoption of the federal constitution; also a note at foot of page 53 showing the sense in which many of the states have understood the meaning of the terms "inspection laws."

The inspection of logs as carried on at West Newton Slough is not a regulation of commerce, but a reasonable and authorized exercise of the police power of the state.

> "'General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon congress the regulation of commerce it

was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said, generally, that legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate or in any other pursuit.'

"We do not think that the statute of Louisiana was in conflict with the commercial power of congress prescribed by the constitution, and the supreme court of Louisiana did not err, therefore, in sustaining it. It provided only a regulation for the measurement of the coal and coke boats on the Mississippi, and of the coal and coke carried, which neither increased nor impaired the commerce of the country in the carrying form of the boats or in the coal and coke carried."

Pittsburgh, etc., vs. *Louisiana, 156 U. S. 599.*

The character of the business as disclosed by the evidence conclusively demonstrates that it is a proper subject for the attention of the state. It is difficult to find in all of the cases extant a subject to which state inspection can more appropriately be applied. The works are so constructed as to bring within the boom every loose log which floats down the Mississippi river. The evidence shows that "scrabbles" and prize logs have found their way into it.

But the law was not enacted for any particular boom, but for every chartered boom constructed on any of the waters of the state. The law makes no exceptions. The legislature never intended that it should be withheld in its operation from

a given boom upon the ground that such boom was constructed for the sole convenience of its owners or certain patrons, in handling logs cut in a particular district, whether within or without the state.

The contention of plaintiffs that the boom is a mere incident to their business of transporting their logs from the banks of the Chippewa to the State of Iowa or elsewhere, is wholly without force, and unsupported by any well considered case. It is opposed by the great weight of judicial authority in this country.

The foregoing authorities enunciate the following principles, which, it is believed, are unshaken by any subsequent decisions of this court.

1. It is only when, in the judgment of congress, the action of a state is deemed to encroach upon the navigation of a river as a means of interestate and foreign commerce, that that body may interfere and control or supersede it.

Huse vs. Glover, supra.

2. How the highways of a state, whether on land or by water, shall be best improved for the public good, is a matter for state determination, subject always to the right of congress to interfere.

Id.

3. A charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation.

Packet Co. vs. Keokuk, supra.

4. State action in matters of a local character can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded.

Transportation Co. vs. Parkersburg, supra.

5. Inaction upon such subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority.

Id.

6. There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading.

Sands vs. *Manistee River Imp. Co., supra.*

7. Inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country.

Gibbons vs. *Ogden, supra.*

8. The placing of a draw bridge across a navigable river is not an interference with commerce by the State of Ohio.

Palmer vs. Commissioners, supra.

It is the contention of the defendant-in-error that the construction of a boom in the Mississippi river at a point where that stream is annually used for the floatage of many million feet of logs cut from the forests of Minnesota, is a reasonable improvement in aid of commerce and that the exaction of tolls by its owner is not the imposition of a burden upon commerce. From this it naturally follows that reasonable fees exacted to compensate for public inspection, and not for revenue, is a valid exercise of the public powers and not in violation of the

commerce clause of the constitution. In this connection, it is not to be overlooked that all the fees collected go to the officer.

The right of inspection in such a case rests upon other grounds than those appearing in the line of authorities in which it was held that the state had exceeded its powers and upon which plaintiff-in-error seems to rely.

The Minnesota statute does not apply to rafts, nor even to logs driven by the boom down the river, but to loose logs gathered into booms which are then liable to be stolen. That there is a constant liability to confusion of logs is shown by the evidence. Sometimes there are logs scaled without marks (Record, 66); rafts break up and the logs float into the boom (Record, 66). Rafts were floated down the Mississippi from Stillwater (Record, 66). Logs sometimes escaped the boom at Minneapolis (Record, 76, 80), and at other points (Record, 81). Confusion of saw logs is a common experience (Record, 77, 82). One witness has "picked up" logs to the annual amount of 300,000 to 500,000 (Record, 84). One boat captain stated that the winds are very bad on Lake Pepin—a lake in the Mississippi river above the West Newton boom—and that he had seen rafts broken up there (Record, 86).

While we deem it immaterial, so far as the right of the state to provide for the inspection of logs running out of the boom at West Newton Slough is concerned, where the logs came from, the foregoing statement of the evidence is abundant warrant for the intervention of the state in the manner provided by the provisions of statutes above cited.

It remains to explain the decision relied on by the plaintiff-in-error.

Wabash, St. L. & P. Ry. Co. vs. *Illinois*, 118 U. S. 557, was a case in which the state sought to fix the rate of the railroad company as to interstate business.

Robins vs. *Shelby Co. Taxing Dist.*, 120 U. S. 489, was a case in which the State of Tennessee attempted to compel non-resident drummers to take out a license before they could

lawfully offer goods for sale in the various counties of the state. This was denied, while, at the same time, it is expressly stated that a state may pass "inspection laws to secure the due quality and measure of products and commodities" (p. 93).

Philadelphia & Southern Steamship Company vs. *Pennsylvania*, 122 U. S. 326, was a case where the State of Pennsylvania attempted to impose a tax upon the gross receipts derived from interstate business.

Fargo vs. *Michigan*, 121 U. S. 230, was also an attempt to tax gross receipts upon interstate business.

Railroad Company vs. *Husen*, 95 U. S. 465, was an attempt to prohibit the driving into the State of Missouri between the first day of March and the first day of November, of Texas, Mexican or Indian cattle, whether diseased or sound. It was simply prohibitive—a most oppressive interference with interstate commerce.

Bowman vs. *Chicago and Northwestern Ry. Co.*, 125 U. S. 465, was a case where the State of Iowa attempted to prohibit the importation into the state of intoxicating liquors.

Le Loup vs. *Port of Mobile*, 127 U. S., 640, was a case where the State of Alabama attempted to impose a license tax on interstate telegraphic communications.

Asher vs. *Texas*, 128 U. S., 129, is like *Robins* vs. *Shelby Taxing District*, which it affirms.

Stoutenburgh vs. *Hennick*, 129 U. S., 149. Same comment as last above.

Western Union Telegraph Co. vs. *Alabama State Board*, 132 U. S., 472. This case is essentially like *LeLoup* vs. *Port of Mobile*.

McCall vs. *California*, 136 U. S., 104, was an attempt by the board of supervisors of the city and county of San Francisco, to impose a license tax upon an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not

engaged in selling tickets for the route, or, receiving or paying out money on account of it.

The Court cites *Pomeroy on Constitutional Law*, section 378, where referring to the signification of the word "commerce" the author says:

> "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. * * The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. *All these may therefore be regulated.*"

Speaking of the agency, this Court say:

> "It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

Norfolk & W. R. R. Co. vs. *Pennsylvania*, 136 U. S., 114, was a case in which the State of Pennsylvania attempted to impose a tax upon a railroad company, which was a link in a through line of road, for the privilege of keeping an office in the state.

Lyng vs. *Michigan*, 135 U. S. 161. This case merely followed *Leisey* vs. *Hardin*, 135 U. S. 100 in which it was held that the sale of intoxicating liquors by the agent of the importer, while such liquors were in their original package, could not be restrained by the state.

Cutcheon vs. *Kentucky*, 141 U. S. 47, involved a statute of Kentucky providing that the agent of an express company, not incorporated by the laws of that state, should not carry on business there without first obtaining a license from the state.

Brennan vs. *Titusville*, 153 U. S. 289. An ordinance of the

city of Titusville required agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor. The court cited most of the decisions relied on here by the plaintiff-in-error to the effect that such an ordinance sought to impose a tax upon commerce in violation of the constitution.

Pollock vs. *Farmers Loan and Trust Co.*, 157 U. S. 429, a case involving the power of Congress to impose direct taxes.

There is not one of the above cited cases which is not obviously distinguishable from the case at bar. For this reason, we deem any discussion wholly unwarranted.

It is insisted by the plaintiff-in-error that the doctrine announced in *Gibbons* vs. *Ogden*, 9 Wheaton, 1, is overruled by the following cases:

Wabash, etc., Ry. Co. vs. *Illinois, supra.*
Robins vs. *Shelby County, supra.*
Bowman vs. *Railway Co,, supra.*
Leisy vs. *Hardin, supra.*

We have already indicated, in brief words, the nature of these cases. No occasion arose in either of them to call in question the doctrine of *Gibbons* vs. *Ogden*. It is not, and cannot be claimed by the learned counsel that this Court has in any of those cases, by express words, overruled the doctrine of that case. We rely upon the belief that where it is overthrown it will be by clear and express language. If any principle has become strongly entrenched in the judicial thought of this country, it is the one which was then so clearly expressed by Chief Justice Marshall, and which has been followed with approval in numerous decisions of this Court.

But the contention is completely overthrown by the recent case of

Huntington vs. *Georgia*, 163 U. S. 308, where the Court say:

"In *Gibbons* vs. *Ogden*, 9 Wheat. 1, this Court rec-

> ognized the possession by each state of a general power of legislation, that 'embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves.' Inspection laws, although having, as the Court said in that case, 'a remote and considerable influence or convenience,' are yet within the authority of the states to enact, because no direct general power on the objects of such laws was granted to congress."

The defendants-in-error respectfully submit that the State of Minnesota does not offend against the commerce clause of the federal constitution in providing for the inspection of logs in one of its chartered booms. It is nothing more or less than affording protection to its own citizens who are engaged in the business of floating logs.

Furthermore, it should not be overlooked that because in 1893 the greater part of the logs boomed were cut in Wisconsin, a different state of facts may have existed in any subsequent year. May the hands of the inspector be staved at any time when informed that Wisconsin logs are in the boom? Is it not his duty rather, a duty flowing from clear constitutional right, to inspect all logs running out of the boom, whether of domestic or other origin?

It is respectfully submitted that the judgment appealed from should be affirmed.

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Attorneys for Defendants-in-Error.

LINDSAY AND PHELPS COMPANY *v.* MULLEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 44. Argued April 6, 7, 1899. — Decided January 15, 1900.

The provision in § 2400 of the statutes of Minnesota of 1894, requiring each surveyor general to survey all logs and timbers running out of any boom now chartered or which may hereafter be chartered by law in his district, refers to corporations organized under a general law, as well as to those whose organization is provided for by special act.

The business of booming logs on the waters of streams running through the forests of the West is a lawful business, and the Minnesota Boom Company was a lawfully organized corporation for the purpose of doing such lawful business.

The statute of Minnesota requiring all logs running out of a boom to be surveyed, inspected and scaled is compulsory, and such legislation was within the power of the State.

The scale bills in this case were certified as required by the laws of the State, and, being so certified, were competent evidence; and, when taken in connection with other evidence, supported the finding of the court that the work was done as alleged.

A record in the books of the surveyor general is not preliminary to a right to a lien for such work.

Statement of the Case.

The logs of one party passing the boom can be subjected to a lien for surveying and scaling not only his own logs, but also for surveying and scaling the logs of other parties, as any log owner may send his logs down the river without the use of the boom, taking proper care of them, and if he uses the boom he takes it subject to the conditions prescribed by the legislature.

The improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce.

On August 1, 1893, the plaintiff in error commenced its action of replevin against one of the defendants in error, John H. Mullen, to recover possession of a quantity of logs said to be of the value of $15,000. Mullen answered, alleging that he was the surveyor general of logs and lumber for the fourth district of Minnesota; that as such surveyor general he had scaled and surveyed a large number of logs in a boom belonging to the Minnesota Boom Company, for which service he was entitled to fees amounting to the sum of $11,088.92, and had seized these logs, under the statute giving him a lien, to enforce payment thereof, and praying for a return of the property, or, if that could not be had, for judgment for the sum of $11,088.92, together with ten per cent, $1108.89, costs of collection as provided by law, and interest. To this answer the plaintiff filed a reply, challenging on several grounds the validity of the claim for fees and lien. Thereafter the State of Minnesota was, on its application, made a party defendant, and answered setting forth in substance that since the filing of the pleadings the defendant Mullen had received from the State of Minnesota the full amount of his fees, and had transferred his claim to the State, and adopting the answer of Mullen, so far as it was applicable. On these pleadings the case went to trial before the court without a jury. No special findings of fact were made, but only a general finding for defendants. A bill of exceptions was preserved, reciting the testimony, showing that at the close the plaintiff requested of the court the following declarations:

"First. That it has not been shown that the logs for which

defendants claim fees for scaling in this case ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed or to any lien on the plaintiff's logs therefor; but the court refused to make such declaration; to which ruling and order the plaintiff then and there duly excepted.

"Second. That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

"*a.* Because the scale bills, Defendants' Exhibits 3 and 4, are not evidence of the scaling of the logs therein described.

"*b.* Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district.

"*c.* Because it appears that a very great proportion of the logs mentioned in these scale bills, defendants' exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else.

"*d.* Because the pretended records of said scale bills were not in fact any record whatever.

"*e.* Because it does not appear that any of the log marks shown on defendants' scale bills, Exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the fourth lumber district of the State of Minnesota, in accordance with the provisions of title 3, of chapter 32, General Statutes of the State of Minnesota.

"But the court refused to make such declaration; to which ruling and order the plaintiff duly excepted.

"Third. That the statute under which the defendants claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the State of interstate commerce and is unconstitutional and void, being in contravention of subdivision 4, of section 8, of article 1, of the Constitution of the United States."

Upon the general finding the court entered a judgment for the defendants for a return of the property or the payment of the fees, costs and interest. Thereupon the plain-

tiff brought the case directly to this court by writ of error on the ground that the laws of Minnesota, under which these fees and lien were claimed, were in contravention of the Constitution of the United States.

The facts developed on the trial, and upon which the questions of law arise, are these: The State of Minnesota was by law divided into five districts for the inspection of logs and lumber. The fourth district was defined as follows: "The Mississippi River and its tributaries below the outlet of Lake Pepin to the southern line of Wabasha County." The defendant Mullen was the duly appointed and qualified surveyor general of logs and lumber for this district, and as such performed the services for which the fees and lien were claimed. The Minnesota Boom Company was a corporation organized under the general laws of the State of Minnesota in April, 1889. The purposes for which the corporation was organized are stated in article 1 of its charter:

"The general nature of the corporate business shall be the construction, maintenance and use of booms, dams and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi River, or either bank thereof, between the mouth of the Chippewa River, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi River or a point opposite thereto, and also upon, or on any side or bank of, any slough, bayou, branch or part of the Mississippi River between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation beside the construction, maintenance and operation of said structures shall be gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling any and all logs, lumber and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber or timber upon any of said waters or within said territory and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with

those logs, lumber or timber for any work or services done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid."

It constructed a boom on West Newton Slough, within the limits of the fourth inspection district, above defined. This slough is an arm or minor channel of the Mississippi River, bounded on its southwestern side by the main land, constituting the State of Minnesota, and on the other side by an island, extending up and down the river about three miles, and dividing this slough from the main channel of the river. The works of the boom were in this slough, but at the upper end of the island, extending diagonally across the river to the Wisconsin shore, was a structure called a shear boom, so arranged that when closed it turned all the logs coming down the river into the upper end of the boom. When one end of it was released it floated down the stream and thus allowed free passage up and down the main channel. Above the head of this boom the Chippewa River empties into the Mississippi. The Chippewa River is wholly within the limits of the State of Wisconsin, and the logs, which this boom was constructed to secure, and which in fact it did secure, were mainly logs coming out of that river and which had been cut within the limits of the State of Wisconsin.

The statutes of Minnesota, so far as they are pertinent to this inquiry, in reference to booms, scaling and surveying, are the following:

"Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein, which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side, rolling, sluicing

and flooding dams, or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for which same was incurred, and may seize, in whosever possession found, and hold a sufficient amount thereof to pay the same, and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justices of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining State,

and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining State created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining State, whenever the purposes for which the corporation in this State is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two thirds ($\frac{2}{3}$) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act." (Section 2 of chapter 221 of the laws of the State of Minnesota for the year 1889. Act of April 24, 1889.)

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the end of each month, when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected

in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor general, or copies of such records duly certified, shall, in all courts of this State, be *prima facie* evidence of the matters stated in such scale bill, record or copy." (Section 14 of chapter 32, title 3, of the General Statutes of Minnesota for 1866, being now section 2400 of the Statutes of Minnesota of 1894.)

"The fees of surveyor generals shall be: For surveying, scale marking, making scale bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for travelling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index to the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for travelling, surveying, making scale bills, or recording the same, or for any or all of such services, such surveyor general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon, and may retain such lien by affixing to the scale bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or

taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days' notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent on the amount due, for taking care of the property and, to the officer making the sale, ten per cent on the amount payable to the surveyor general." (Section 16 of chapter 32 of the General Statutes of 1866, being section 2402 of the Statutes of 1894.)

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages and orders, and other instruments in writing for the sale, transfer, incumbrance or other delivery of any logs or timber in the same district.

"Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or

marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and effect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and authorized to be kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this State, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all the courts of this State, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated." (General Statutes 1866, chap. 32, title 3, sec. 17. As amended 1877, chap. 18, sec. 3, being now sec. 2403 of the Statutes of Minnesota of 1894.)

In addition to these statutes must be noticed chap. 401, Laws of Minnesota, 1895, which is entitled "An act for the relief of John H. Mullen, and to appropriate money therefor," the first two sections of which are as follows:

"SEC. 1. That the sum of fifteen thousand eight hundred (15,800) dollars be, and the same is hereby appropriated out of any money in the state treasury not otherwise appropriated for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the fourth district of the State of Minnesota, in accordance with the instruction of the Governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same

to said Mullen, and the state treasurer is hereby directed to pay the same.

"SEC. 2. Before said payment is made said Mullen shall assign to the State of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the State of Minnesota shall proceed to collect the same in the name of said Mullen or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the State of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act."

Under the authority of this statute the defendant Mullen received payment of the amount charged for fees, etc., and assigned his claim to the State, and under and by virtue of this assignment the State became a party to this litigation, as heretofore stated.

Mr. Newell H. Clapp for plaintiff in error. *Mr. Moses E. Clapp* filed a brief for same.

Mr. Wallace B. Douglas for defendants in error. *Mr. H. W. Childs* was on his brief.

Mr. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Upon the foregoing facts the plaintiff contends: First. That the boom at the West Newton Slough, through which the logs scaled by the defendant Mullen passed was not "any boom . . . chartered by law" within the scope of section 2400 of the Statutes of 1894. This contention cannot be sustained. The words "chartered by law" are not to be understood as referring simply to corporations incorporated under special acts. A corporation which is organized under a general law is as much "chartered by law" as one whose organization is provided for by special act. So that on the face of this

statute, and giving to its words their natural meaning, it includes every corporation, whether incorporated under general or special law, with authority to maintain a boom. The mere fact that in early times four special charters were granted to boom companies cannot work any limitation upon the meaning of the words used in this statute. If the legislature of Minnesota had purposed any such distinction, its language would have been more apt. It would not have used words broad enough to have included any corporation of the kind described.

As a matter of fact, this corporation was organized some eighteen days before chapter 221 of the Laws of 1889 was passed. Prior to that time there was an act (General Statute Minnesota, 1866, chap. 34, sec. 1, as amended by chap. 13, Laws Minnesota, 1873) which authorized the formation of corporations for various purposes named, and also "other lawful business." Under that statute this corporation was formed. That the business of booming logs on the waters of streams running through the forests of the West is a lawful business cannot be doubted.

In *City of Erie* v. *Canfield*, 27 Michigan, 479, 482, the Supreme Court of Michigan said:

"It is clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season — where in fact the principal industry consists in cutting, floating and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation; the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place

upon the market. It is just and reasonable, therefore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream."

And in *Pound* v. *Turck*, 95 U. S. 459, 464, is a clear recognition of the lawfulness of this booming industry, as appears from the following quotation:

"There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to sawed logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter."

Indeed, it would strike a serious blow at the legislation of many of the Northwestern States and an immense volume of business that has been carried on under the authority of that legislation, to hold that the booming of logs was not a lawful business.

That those words, "other lawful business," as found in the statute are not to be narrowly construed, but are broad enough to include an incorporation for this purpose, is made clear by the decision of the Supreme Court of Minnesota in *Brown* v. *Corbin*, 40 Minnesota, 508, 509, in which the court said:

"Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated,

and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense, in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by *quasi* public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

The corporation then having a legal existence at the time the act of 1889 was passed, section 3 of the act expressly provided that it should apply to corporations previously organized for the purposes specified in section 2. In other words, all the rights, privileges and powers conferred by the act of 1889 were by this section given to existing corporations. So that we have the case of a corporation, organized under the general law of the State, given by subsequent statute full powers in reference to the maintenance of a boom, and in fact maintaining a boom; and the case therefore comes within the specific description in section 2400 of a boom chartered by law.

Further than that, the legislature of Minnesota accepted the claim of the surveyor Mullen as valid under its laws, and thus impliedly recognized the boom company, involved in this controversy, as one chartered by law within the scope of the statutes providing for inspection, scaling and charges therefor.

The second contention is that the statutes of Minnesota were not intended to and do not in fact give the surveyor general any lien upon the logs of private parties for inspecting and scaling logs run through chartered booms. Reference is made by counsel to several statutes in which there is provision for the action of the surveyor general in surveying and scaling lumber at the instance of parties interested. We deem it

unnecessary to investigate those statutes, for the sections quoted plainly indicate that the survey and scaling in case of a chartered boom is not solely at the instance of the owner or owners of the logs, but is compulsory. Section 2400 declares that "the surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district." To those unfamiliar with the logging business as carried on in the timber regions of the North and Northwest this compulsory surveying and scaling may seem unnecessary, but all legislation may rightfully be adjusted to the actual operations of business, being intended to facilitate those operations and protect all who are engaged therein. Many are engaged in the cutting of logs in these lumber districts. That business is facilitated by any system which permits those parties to turn their logs into an adjacent stream and let them float down to some place where they can be collected and brailed. In that way each individual cutter is saved the necessity of brailing his logs at every place where he may bring them to the water. The several States in which these lumber districts are situated have assumed the power of taking charge of these logs thus put singly into a stream, collecting them at one place, separating them to their respective owners, and thus facilitating the forwarding in raft to market. Of course, such work entails expense, and the expense is rightfully charged upon the property thus separated and marked. The thought in this respect is well expressed by the Supreme Court of Minnesota in *Osborne* v. *Knife Falls Boom Corp.*, 32 Minnesota, 412, 419:

"Now it appears that there is a large number of persons . . . owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stopped before passing Knife River Falls; the interest of the former that their logs should be allowed to run over them without interruption. In

this conflict who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the legislature — that department of government which, in the exercise of a lawmaking and a police power, prescribes the rules by which the use of public highways in general is regulated, *Pound* v. *Turck*, 95 U. S. 459; *Watts* v. *Tittabawassee Boom Co.*, 52 Michigan, 203, and save as controlled by paramount law — that is to say, in this instance, by our state constitution or enabling act — the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromise of conflicting interests — the best attainable good of all concerned. *Pound* v. *Turck*, *supra; Duluth Lumber Co.* v. *St. Louis Boom Co.*, 17 Fed. Rep. 419. In the exercise of its legislative discretion it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be, as booms, dams, piers, sluiceways, and what use may be made of them, and, in general, in what manner the business shall be conducted. . . . On the whole, this is an improvement of the river for the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation."

In furtherance of the thought thus expressed the legislature of Minnesota has given the right to boom companies duly incorporated to take possession of the great mass of floating logs coming down a stream, and requires that those logs thus taken possession of shall be inspected and scaled under the supervision of some state official. In that way each individual owner and cutter has a guarantee of safety in respect to his logs, and the general interests are so manifestly subserved that there can be no reasonable doubt of the legislative power

of supervision, inspection and scaling. And the language of the statute being mandatory, we are of the opinion that such was the intent of the legislature, and that such legislation is within its power.

A third proposition is, that it is not shown that the defendant, Mullen, complied with the statutes of the State of Minnesota which give a lien on logs so as to be entitled to any lien on these logs, or any right of possession thereof, and it is with reference to this matter that the second declaration of law was asked by the plaintiff. The contentions of the plaintiff in this respect seem to be, first, that the scale bills were not of themselves competent evidence, and that without them there was no clear and satisfactory evidence of the number of feet surveyed and scaled; second, that because they were not recorded in the books of the surveyor general the right to a lien had not arisen; and, third, that the testimony shows that the logs in fact surveyed and scaled and for which these fees and lien were claimed were not all the property of this plaintiff.

With reference to the general proposition that the defendant, Mullen, by himself and deputies, was busy in scaling logs in that boom during the months named, there is abundant testimony, and when the question is only as to the sufficiency of testimony to establish a given fact, it is enough to say that this court does not inquire into the mere matter of sufficiency. Matters of fact are settled by a verdict of a jury or the general finding of a court, and if there be testimony fairly tending to support the finding, it is conclusive in this court.

But we are not disposed to question the competency of the scale bills as evidence. Section 2403 provides that the books of the surveyor general's office "are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this State, be taken and held to be *prima facie* evidence of the matters therein stated." In other words, the records, like the original instrument, are *prima facie* evidence of the matters stated in them. *Clark* v. *C. N. Nelson Lumber Company*, 34 Minnesota, 289; *Glaspie* v. *Keator*, 12 U. S. App. 281, 290. In both of those cases scale bills some-

what defective in form were declared under the statute competent evidence. Attached to the scale bills herein was a certificate of the surveyor general stating, as required by section 2402, the amount due him thereon, and that he scaled the logs, timber or lumber relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection. The scale bills, thus certified, were delivered to the managing agent of the boom company. Now, whatever suggestions may be made as to the incompleteness of these scale bills, they were, as thus certified, competent evidence, and, when taken in connection with the other evidence of work actually done by the surveyor general and his deputies, was testimony fairly tending to support the general finding of the court, and we are not at liberty to ignore the effect of that finding.

With regard to the second contention, we do not understand that a record in the books of the surveyor general is preliminary to a right to any lien. By section 2402 he is given a lien for certain services; and while it is true that by section 2400 he is required to record the scale bills in the books of his office, and upon being paid his fees therefor to deliver the original bill to the owner or managing agent of the boom, yet for any services other than the mere making of the record we are of the opinion that under the two sections referred to he establishes his lien by the rendering of the services and affixing to the scale bill the prescribed certificate.

With respect to the final contention under this head, that the logs of the plaintiff, seized by the surveyor general, were so seized under a claim of lien for services rendered in inspecting and scaling logs other than those of the plaintiff as well as its own, the fact is as claimed. An important question is thus presented whether the logs of one party can be subjected to a lien for surveying and scaling, not only his own logs, but also for surveying and scaling logs belonging to other parties. The statement naturally suggests a negative answer, and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property. And yet, under the circumstances of the case, we

are constrained to hold that the lien was good, and must be enforced for the entire amount claimed. And this upon the proposition that for the purposes of a lien the boom company must be considered in a qualified sense the owner of all logs that it takes into its possession. The legislature in providing for a lien recognizes only the boom company. By section 2 of chapter 221 it gives the company authority to establish a boom, construct all the works necessary for its successful operation; then empowers it to take possession of all logs floating down the stream (with certain exceptions not necessary to be noted in this connection), and in and by the conveniences of said boom to sort and brail all logs which it takes possession of; to "charge and collect reasonable and uniform tolls," and have a lien for the tolls, and all costs and expenses; hold a sufficient amount of the logs received to pay the same, and to make sale thereof in default of payment upon ten days' notice. Involved in the costs and expenses is the fee for inspection and scaling, as provided by the laws of the State, and the inspector is required to give at the end of each month to the owner or managing agent of the boom a true and correct scale bill for all the services he has rendered. So, while the owner of the logs may obtain from the surveyor general a certified copy of the inspection and scaling, yet the inspector deals in the first instance with the boom company. To it he gives his scale bill, properly certified, and by virtue thereof he is given a lien upon the logs in the custody of the boom company. The boom company, for its protection, is given a lien on the logs of each owner. Obviously there was seen to be a practical difficulty in limiting the lien of the surveyor general for his services in inspecting and scaling to the logs separately upon which the services were rendered. The logs are turned into the custody of the boom company. It arranges for their separation and brailing, and delivers them, when thus brailed, to the owner as demanded. The fees for the surveyor general's services were therefore made chargeable to the boom company, and under its charter it had authority to collect from each log owner all charges and expenses, including therein the fees due the surveyor

general. The log owner dealt with the boom company, and had a right to call from that company for a delivery of his logs duly brailed or rafted whenever he saw fit. To require the surveyor general to stand watch at the exit of the boom to demand of each log owner his fees, or in default of payment to seize the logs thus ready for their future transit down the river, would cast upon the surveyor general not merely the duty of inspecting and scaling, but also, for his own protection, the duty of keeping an additional watch to secure the payment of his fees. It was not unreasonable on the part of the legislature, when it gave the boom company a lien upon all logs turned into the boom, to require that it should be responsible to the surveyor general for his fees, and that he, looking to the boom company for payment thereof, should have a right to enforce a lien upon any logs turned into the boom. It cannot be said that there is, in the nature of things, such an inseparable connection between services rendered and the thing upon which the services are rendered that a lien for the former can only be enforced upon the latter, or even that such lien must be limited to the owner of the latter, for it is within the discretion of the legislature to determine whether, considering all the circumstances, the use of a given instrumentality shall not subject the party seeking that use to a lien upon his property for all the services rendered by the State to the instrumentality. Take the ordinary case of a warehouse for the receipt and discharge of grain. Can it be that the lien for the services of a state inspector must necessarily attach separately, and only separately, to each bushel of grain delivered to and received therefrom? Is it not within the competency of the legislative power to declare that the owner of the elevator, like the owner of a boom, stands, as to all property received into it, as *pro tanto* an owner, and to give to any official charged with the duty of inspection a lien upon any and all of the property thus received for his services in the matter of inspection, especially when it gives to the owner of the elevator or the boom a lien upon the property placed in his possession for all services, charges and expenses?

We are of opinion that it was within the power of the legislature to so provide. It is not for the courts to inquire whether any other provision would have been wiser. The only question for us to consider is whether that which has been made was within the power of the legislature. It must be borne in mind that while the lien is given for the services rendered, the use of the facilties of the boom is not compulsory. We do not mean to say that a log cutter may throw his logs loosely and separately into the river and let them float down, trusting to luck that they will do no injury. Doubtless any one may make his own raft and send it down the stream, provided he places in charge of it a sufficient number of men to suitably protect it from doing injury or interfering with others in their use of the stream. A main purpose of the boom is to stop and collect the floating logs, and the State having control over the river as a highway of navigation may make such provisions for the use of that highway by the different parties seeking to use it as will prevent any injury by one upon the other. Just as the ordinary land highways are free to the use of the public, yet it is within the competency of the legislature to make such provisions as will prevent the use by one working injury to others; and if a party wishes to use a highway in a manner which may tend to work injury to others he cannot complain if the legislature interferes and provides some means for preventing such injury. In that way it may be said that any log owner may send his logs down the river without the use of the boom, and when he decides to avail himself of the boom it cannot be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions which the legislature prescribes for the use of such boom.

A final objection is that even this boom was one chartered by law, within the meaning of section 2400, and although the defendant, Mullen, had performed all that was required of him by the statute to secure a lien, still the law as applied to this boom, and in so far as the logs in question are concerned, is a regulation of interstate commerce which the State of Minnesota has no authority to make. It appears that these

logs, and indeed the bulk of the logs passing into this boom, came out of the Chippewa River, a stream wholly within the limits of the State of Wisconsin. The boom company was chartered by the State of Minnesota, and its principal works were within the limits of that State. Counsel for plaintiff refer to many decisions of this court in which the general power of Congress over interstate commerce and the inability of the State to burden in any direct way such commerce have been affirmed. Passing by most we may notice these quotations, as illustrating the scope of our decisions. Thus in *County of Mobile* v. *Kimball*, 102 U. S. 691, it is held that "commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property;" and in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose;" and from *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 571, this paragraph is quoted: "But we think it may safely be said, that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position; it does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent, in the management of his business throughout his entire voyage. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to

regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

Upon these authorities it is contended that the navigation of these logs from the place of cutting in Wisconsin along the navigable waters of Minnesota, to their market, wherever it may be in the lower waters of the Mississippi, must be free. If Minnesota can burden the transit with the expense of booming, inspection or scaling, why may not Iowa, Illinois, Missouri and any other State along whose borders the logs may pass before reaching their destination? Even if a State may (as would seem to be indicated by the decisions heretofore referred to), for logs cut within its borders, provide booms, compel their use and enforce payment for the expenses thereof, because for those logs no interstate commerce has commenced, yet here Minnesota is directly regulating the transit of logs cut in another State and passing through its borders on their way to market. This is undoubtedly the most significant if not perhaps the only distinctive Federal question presented in this record.

We are not disposed to limit in the slightest degree the scope and effect of the decisions referred to. But we are of opinion that these authorities are not pertinent, and that the matter is governed by another line of decisions equally clear and as frequently recognized. The State has a right to improve the waterways within its limits and to make reasonable charges for the use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal. This parallel line of decisions runs back to the early history of this court. In *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 245, it was held that, inasmuch as Congress had passed no act bearing upon the case, the State of Delaware might authorize the building of a dam across the Blackbird Marsh Creek, although thereby a navigable waterway was obstructed. In *Pound* v. *Turck*, 95 U. S. 459, the right of a State to make dams, booms and other instrumentalities to be used in the navigation of logs and lumber was adjudged. Other decisions affirmed the power

of the State to build bridges, even toll bridges, over navigable streams, to construct wharves and charge wharfage. In *Huse* v. *Glover*, 119 U. S. 543, 548, the right of the State of Illinois to collect tolls for the passage of vessels through locks in the Illinois River was sustained, the court saying:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."

In *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 295, a corporation had been authorized by the State of Michigan to improve the Manistee River, and to charge tolls for the use of the improvement. An action to collect tolls was resisted on the ground that the imposition was a taking of property without due process of law, which contention was overruled, and in the course of the opinion it was said:

"The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State — that is, the commerce which is wholly confined within its limits — is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of

those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. (*Huse* v. *Glover*, 119 U. S. 543, 548.) Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State."

Many other cases of similar import might be cited, but these are enough to disclose the principle which is clearly recognized.

The principal works of the boom company are wholly within the State of Minnesota. The centre of the main channel of the Mississippi River is northeast of the island. The State of Minnesota had therefore the undoubted right to improve this portion of the Mississippi River lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself, or could authorize a corporation to do the work, and it could prescribe any reasonable fees for the use of the improvement. The power of the State to authorize the construction of these works did not depend at all upon the question whence all or most of the logs likely to be run into the boom should come. It is enough that the State authorized this improvement and prescribed the conditions upon which it might be used by any owner of logs. These conditions are not shown to be unreasonable. It is a legitimate exercise of power on the part of a State to provide state supervision of what is done in works of such a character, and to require payment of reasonable charges for such supervision. It does not appear that the plaintiff was compelled to avail itself of this boom; that its logs were forcibly seized by the boom company, and against its will passed through the boom. On the contrary, it would seem not improbable from the testimony that the persons who organized and owned the boom company were engaged in the

business of cutting logs on the Chippewa River, and that this litigation sprang from their desire to get all the benefits of the boom without submission to the inspection laws of the State, which gave authority for the works. At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the State which authorized the construction of the works.

It is true that that which is called a "shear boom" extended across the navigable channel of the Mississippi and to near the Wisconsin shore; but if neither the State of Wisconsin nor the United States complained of this as an obstruction of the navigation of the Mississippi, it does not lie in the mouth of the plaintiff to complain. Indeed, its complaint is not that the shear boom interfered with its rights of navigation in any way, but that after its logs had been passed into the works constructed under the authority and within the limits of the State of Minnesota it was not permitted to avail itself of the advantages furnished thereby and repudiate the charges prescribed by the State.

Before passing from a consideration of the right of this boom company under its charter to place the shear boom across the main channel of the Mississippi it may not be inappropriate to notice a decision of the Supreme Court of Wisconsin upon a like question. In *J. S. Keator Lumber Company* v. *St. Croix Boom Corporation*, 72 Wisconsin, 62, 88, it appeared that the St. Croix Boom Company was a corporation created by the State of Minnesota, and that it had constructed its boom on the St. Croix River at a place where the river was the boundary line between Minnesota and Wisconsin, and wholly occupied the river with its works. An action was brought to recover damages on account of the way in which the boom was constructed and operated. The opinion of the Supreme Court, by Mr. Justice Cassoday, is a very elaborate discussion of the rights of parties. In it it is said:

"The obstructions here complained of were in that part of the St. Croix River constituting the boundary line between

this State and Minnesota. The defendant justifies under corporate authority derived solely from Minnesota. We are here confronted with the question whether such authority, so granted by that State alone and without the concurrence of this, is of any validity. Our constitution declares that 'the State shall have concurrent jurisdiction on all rivers and lakes bordering on this State, so far as such rivers or lakes shall form a common boundary to the State and any other State or Territory now or hereafter to be formed and bounded by the same.' (Sec. 1, Art. IX, Const. Wis.) This provision is substantially the same as the third section of the act of Congress of August 6, 1846, enabling the organization of this State preparatory to its admission into the Union. Substantially the same provision, as applied to Minnesota, is found in sec. 2 of art. II of the constitution of that State, which is in substance the same as section 2 of the enabling act for the organization of that State passed by Congress in 1857. Such 'concurrent jurisdiction,' therefore, is fairly established by the combined action of the general government and each of these two States. Its significance is the important inquiry presented. No one will deny that the one State has as much jurisdiction over the commerce of the river as the other, nor that the jurisdiction of each and both must be and remain subordinate to any action of Congress under the commercial clause of our national Constitution. The question recurs whether one of these States, without the concurrence of the other, can legally grant the booming privileges and rights authorized by the defendant's charter."

Without attempting fully to define the rights which either State might grant, it was held that a private party could not maintain an action for damages on the ground that Minnesota had exceeded its jurisdiction in granting rights upon waters within the limits of Wisconsin. Referring to *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 80, the court stated the facts and the rulings in that case, and summed up its own views in these words (pages 98, 99):

"The plaintiffs owned certain mills in Pennsylvania, opposite Trenton, New Jersey, supplied with water from a dam in the

Delaware River, by a title running back prior to 1771. In that year the two provinces, which subsequently became the States of Pennsylvania and New Jersey, respectively passed acts declaring the river a common highway for the purposes of navigation, and appointed commissioners with full power to improve such navigation and remove any obstructions. By compact in 1783, it was agreed by the two States that the river should continue to be and remain a common highway in its whole length and breadth, equally free and open for the use, benefit and advantage of each of the two States. The defendant company was incorporated under the laws of New Jersey in 1830, and was thereby authorized to and did construct a canal in that State, with a feeder from a dam in that river above the plaintiffs. The action was brought by reason of the diversion of such water, to the damage of the plaintiffs. The court held, in effect, that the plaintiffs had no grant of the usufruct of the waters of the river, but only a license to draw from their dam; that such license was revocable and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly or by a corporation created for that purpose; that the plaintiffs, being but tenants at sufferance in the usufruct of the water of the two States, who owned the river as tenants in common, were not in a condition to question the relative rights of either State to use its waters without the consent of the other; that as, by the laws of their own State, the plaintiffs could have had no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so they could not sustain a suit against a corporation created by New Jersey for the same purpose, which had taken a part of the waters. The principle of that decision seems to be that a mere private party should not be heard to complain that one of two States, divided by such river, had invaded the rightful jurisdiction of the other by diverting more than its share of the waters. So here, we think, the plaintiffs are not entitled to be heard as to whether Minnesota has infringed the rightful jurisdiction of Wisconsin. This State is not a party to this suit, and her comparative rights in

and upon the waters of the river at the points in question cannot be adjudicated in this action."

Without pursuing this subject further, we are of opinion that the improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce. It is nothing more than action upon the part of a State in furnishing additional facilities for the navigation of the waterway, and for such additional facilities reasonable charges may be exacted. The "shear boom," even though it extends across the main channel of the Mississippi River and into the territory of Wisconsin, was not complained of by that State, and the plaintiff cannot be heard to raise any question in that respect. Indeed, its only purpose was to enable the boom company the more easily to collect the logs of plaintiff and others floating down the stream. The work of separation and brailing was done wholly within the limits of the State of Minnesota in works constructed therein. For these reasons we are of opinion that the judgment of the court below was right, and it is

Affirmed.

Mr. Justice Peckham, with whom concurred Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice White, dissenting.

I dissent from that portion of the opinion of the court which determines the validity of a lien upon the logs of one owner in order to secure payment of the fees for the inspection and scaling of logs owned by another.

The situation in which the log owner is placed practically compels him to make use of the boom for the purpose of having his logs inspected and scaled as required by the law, and under such circumstances he cannot be properly or fairly held, by the use of the boom, to consent that his property should be taken for the debt of another person. The mere inconvenience, however great or small, to the inspector, of having

some one watch at the exit of the boom to demand of each log owner the fees for inspecting and scaling his particular logs, furnishes no answer to the objection of the log owner to the taking of his property for the debt of another. This act accomplishes that result in its plainest and baldest form. It reduces to actual practice and in the form of a legislative enactment, sanctioned by judicial approval, the illustration that is generally made for the purpose of showing that there are some things so contrary to justice as to admit of no doubt of their utter illegality; such as the arbitrary taking, under the form of a legislative enactment, of the property of one man and bestowing it upon another.

If an owner is practically compelled, in order to conform to a statute, to use a warehouse for the receipt of his grain, I think it plain that it would be utterly illegal to permit a lien on the grain of such owner to attach, for the purpose of obtaining payment for the services of a state inspector in inspecting the grain of another. Whilst as now decided by the court, a state regulation which substantially compels the sending of logs into the boom to be there inspected and scaled, may not be a regulation of interstate commerce, I think a state regulation which confiscates the logs of one person to pay the debt of another clearly constitutes such a direct burden upon that commerce as to cause the statute making the regulation, at least to that extent, to be repugnant to the Constitution of the United States.

Without enlarging upon what seems to me a very great inroad made upon the rights of individual property by the opinion of the court herein, I am content merely to record my dissent from the doctrine therein announced.

I am authorized to say that Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice White concur in this dissent.